TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1926

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY, PETITIONER,

vs.

MILTON H. SALZ, DOING BUSINESS AS E. SALZ & SON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1926

CERTIORARI GRANTED APRIL 26, 1926

(30,976)

(30,976)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 330

SACRAMENTO NAVIGATION COMPANY, PETITIONER,

vs.

MILTON H. SALZ, DOING BUSINESS AS E. SALZ & SON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1925

In the Southern Division of the United States District Court, for the Northern District of California, Third Division.

IN ADMIRALTY.—No. 17359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the Above-entitled Court:

Please prepare apostles on appeal to contain the following papers:

1. Caption.
2. Statement required by Admiralty Rule 4, Circuit Court of Appeals for the Ninth Circuit.
3. Libel.
4. Answer.
5. Opening statement from transcript, pages 1, 2 and 3.
6. Testimony of Bernard J. Dolan.
7. Testimony of Marshall Cifuentes.
8. Testimony of G. H. Johnston.
9. Testimony of W. P. Dwyer.
10. Extract from transcript, on page 106 thereof, beginning with line 2 and ending with line 25.

11. Exhibits, Libelant's No. 1, Inspection Certificate; No. 4, Shipping Receipts. (Original exhibits, as per stipulation on file.) [1*]
12. Opinion of Judge Dooling.
13. Stipulation as to libelant's damages.
14. Final decree.
15. Notice of appeal.
16. Assignment of errors.
17. Stipulation re record on appeal.
18. Praecipe.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent.

Due service and receipt of a copy of the within praecipe for apostles on appeal is hereby admitted this 8th day of Aug., 1924.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Aug. 8, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Apostles of Appeal.

STATEMENT OF CLERK U. S. DISTRICT COURT.

In the Southern Division of the United States District Court, Northern District of California, Third Division.

No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

PARTIES.

Libelant:

MILTON H. SALZ, doing business as E. SALZ & SON.

Respondent:

SACRAMENTO NAVIGATION COMPANY, a Corporation.

PROCTORS.

For Libelant:

McCLANAHAN & DERBY, Esqs., San Francisco, Calif.

For Respondent:

ANDROS & HENGSTLER, Esqs., F. W. DORR, Esq., San Francisco, Calif. [3]

PROCEEDINGS.

1921.

October 18. Filed Libel. (Admission of service of copy of libel, and waiver of issuance and service of monition endorsed on back of original libel.)

December 29. Filed answer to libel.

1922.

June 16. This case (consolidated with case of Sacramento Navigation Co. vs. British SS. "Raven Rock," etc., No. 17354) came on for hearing before the Honorable M. T. Dooling, Judge. Case submitted.

Filed deposition of A. J. Whyte taken on behalf of libelant.

1923.

November 6. Filed opinion. Ordered that a decree be entered in favor of Libelant.

16. Filed interlocutory decree.

1924.

February 11. Filed stipulation as to Libelant's damages.

26. Filed final decree.

April 24. Filed notice of appeal.

Filed bond on appeal.

May 14. Filed assignment of errors.

August 8. Filed stipulation regarding record on appeal. [4]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

LIBEL IN PERSONAM.

To the Honorable, the Judges of the United States District Court for the Northern District of California:

The libel of Milton H. Salz, doing business as E. Salz & Son, libelant against the Sacramento Navigation Company, a corporation, respondent, in a cause of towage and damages, civil and maritime, alleges as follows:

I.

The libelant herein is and was at all the times herein mentioned doing a shipping, buying and selling business in grain within the State of California and elsewhere, under the style and name of E. Salz & Son, and is and was at all of said times the owner of 9853 sacks of barley shipped and on board of the barge "Tennessee" hereinafter more particularly referred to.

II.

That respondent Sacramento Navigation Company is and was at all times herein mentioned, a corporation duly organized and existing under the laws of the State of California, with an office and place of business in the city and county of San Francisco, in said state, and was at all of said times engaged [5] in the transportation of merchandise on the Sacramento River in said State and in and on the tributaries, straits, bays and harbors connected with said river, and elsewhere, and is and was the owner and operator of the stern wheel steamer "San Joaquin No. 4" and said barge "Tennessee."

III.

That on to wit: Saturday, October 1st, 1921, libelant had shipped and turned over to respondent, and respondent had received in good order and condition said 9853 bags of barley for transportation, and on said October 1st said 9853 sacks of barley were loaded on said barge "Tennessee" and under tow of the said stern wheel steamer "San Joaquin No. 4" was being transported from various points on said Sacramento River to Port Costa on the Straits of Carquinez, said Straits being the outlet with San Pablo Bay of said Sacramento River. That in the early morning of said Saturday, October 1st, 1921, while said barge "Tennessee" was being towed as aforesaid by said stern wheel steamer "San Joaquin No. 4" with said 9853 sacks of barley on board and when said towing steamer and her tow were nearing said Port Costa on said Straits

of Carquinez, said towing steamer negligently fouled and negligently permitted said barge "Tennessee" to come into collision with the British steamer "Raven Rock" lawfully anchored at the time in said Straits and away from the fairway of vessels proceeding therein.

IV.

That at the time said "Raven Rock" was fouled and brought into collision with said barge "Tennessee" as herein alleged, the wind was light, the weather clear and the tide at strong ebb; and as a result of said negligent fouling and collision said "Tennessee" was swamped and said 9853 sacks of barley were so damaged as to become a total loss. [6]

V.

That libelant is informed and believes and on such information and belief alleges, that said fouling and collision were solely caused by the improper and negligent handling of her tow by said stern wheel steamer "San Joaquin No. 4" in that with an abundance of sea room she failed to make due and proper allowance for the wind and tide then prevailing and on approaching said anchored steamer negligently and in an unseamanlike manner attempted to pass said anchored steamer and/or attempted to make a landing at said Port Costa.

VI.

That as a result of said fouling and/or collision and the consequent loss and/or damage to said 9853 sacks of barley, libelant has suffered damages in the sum of Thirteen Thousand ($13,000.00) Dollars, or thereabouts.

VII.

That all and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that a monition in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the respondent, the Sacramento Navigation Company, and that it may be cited to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court may be pleased to decree the payment of the damages aforesaid, with interest and costs and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

McCLANAHAN & DERBY,
Proctors for Libelant. [7]

State of California,
City and County of San Francisco,—ss.

Milton H. Salz, being first duly sworn on oath, deposes and says:

That he is the libelant herein; that he has read the foregoing libel, knows the contents thereof and that the same are true except as to such matters as are alleged on information and belief and as to those, he believes it to be true.

(Sg.) MILTON H. SALZ.

Subscribed and sworn to before me this 17th day of October, 1921.

[Seal]

(Sg.) MURIEL ATHERTON RUSSELL,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within libel is hereby admitted this 17th day of October, 1921, and issuance and service of a monition in said cause is hereby waived.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent.

[Endorsed]: Filed Oct. 18, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [8]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

ANSWER.

To the Honorable MAURICE T. DOOLING, Judge of the United States District Court, for the Northern District of California:

The answer of Sacramento Navigation Company, a corporation, respondent in the above-entitled action, to the libel herein admits, denies and alleges as follows:

I.

Referring to the allegations of paragraph I of said libel, respondent admits that the libelant was and is engaged in the shipping, buying and selling of grain, under the name and style of E. Salz & Son; respondent alleges that it has not sufficient information regarding the allegation that libelant was and is the owner of 9853 sacks of barley shipped on board the barge "Tennessee" to admit or deny said allegation, wherefore the respondent calls for strict proof thereof.

II.

Referring to the allegations in paragraph II of said libel, respondent admits the same. [9]

III.

Referring to the allegations in paragraph III of said libel, respondent denies that on Saturday, October 1st, 1921, or on any other day, on or about that time, the libelant had shipped and turned over to respondent 9853 bags of barley referred to in paragraph I of said libel, or any other bags of barley, for transportation; denies that respondent had received in good order and condition from libelant said

9853 bags or any other bags of barley; respondent admits that on October 1st, 1921, 9853 sacks of barley were being transported on the barge "Tennessee" belonging to respondent from the various points on the Sacramento River to Port Costa on the Straits of Carquinez, but that respondent has not sufficient information regarding the allegation that said barley was owned by libelant, to admit or deny same, wherefore respondent calls for strict proof thereof. Further answering under the allegations of said paragraph III, respondent denies that in the early morning of Saturday, October 1st, 1921, or any other day, the steamer "San Joaquin No. 4" fouled or negligently fouled the British steamer "Ravenrock." Respondent further denies that said "San Joaquin No. 4" permitted or negligently permitted said barge "Tennessee" to come into collision with said British steamer "Ravenrock." Respondent denies that said British steamer "Ravenrock" was lawfully anchored in the early morning of Saturday, October 1st, 1921, in said Straits of Carquinez and respondent denies that said British steamer "Ravenrock" was at said time anchored away from the fairway of vessels proceeding through said straits.

IV.

Answering unto the allegations of paragraph IV of said [10] libel, respondent denies that said British steamship "Ravenrock" was fouled by said barge "Tennessee" or by said steamer "San Joaquin No. 4"; denies that said British steamer "Ravenrock" was brought into collision with said

barge "Tennessee," as in said libel alleged, or at all; denies that the wind was light, admits that the weather was clear and that the tide was at a strong ebb; respondent denies that there was any negligent or other fouling and/or collision at said time due to any fault, negligence, or want of care upon the part of respondent, or upon the part of the said "San Joaquin No. 4" or the barge "Tennessee"; admits that said barge "Tennessee" was swamped whereby her cargo of sacked barley suffered great damage. Referring to the allegations in said paragraph IV that said barley was owned by libelant, respondent has not sufficient information to admit or deny the same, wherefore respondent calls for strict proof thereof.

V.

Answering unto the allegations of paragraph V of said libel, respondent denies that there was any fouling and/or collision which was solely or partly, or in any manner, caused by the handling of the barge "Tennessee" by the steamer "San Joaquin No. 4"; denies that said barge was improperly handled by said steamer; denies that said barge was negligently handled by said steamer; denies that there was an abundance of sea room, denies that said steamer failed to make due and proper allowance for the wind; denies that said steamer failed to make due and proper allowance for the tide then prevailing; denies that said steamer, while approaching said anchored steamer, or at any other time, negligently attempted to pass said anchored steamer; denies that on approaching said anchored steamer or at

any other time said steamer "San Joaquin No. 4" attempted to pass said anchored [11] steamer in an unseamanlike manner; respondent admits that said steamer "San Joaquin No. 4" and said barge "Tennessee" were bound for the landing at Port Costa, and were attempting to make a landing at said Port Costa.

VI.

Answering unto the allegations of paragraph VI of said libel, respondent denies that 9853 sacks of barley or any other sacks of barley were damaged by negligent or other fouling of the steamer "San Joaquin No. 4" and the barge "Tennessee," or either of them with the British steamship "Ravenrock"; denies that said barley or any other barley was damaged by collision as in said libel alleged, or at all, except as hereinafter set forth. Respondent denies that libelant has suffered damages in the sum of $13,000.00 or any other sum as a result of any act of respondent or of any fouling by the steamer "San Joaquin No. 4" and the barge "Tennessee" or either of them; respondent denies that libelant has suffered damages in said sum or any other sum by reason of any collision as in said libel alleged, or due to any negligence, fault, or want of care on the part of the respondent or on the part of said "San Joaquin No. 4" and said barge "Tennessee" or either of them; respondent alleges that it has not sufficient information regarding the allegations that said 9853 sacks of barley were owned by libelant, to admit or deny the same, wherefore respondent calls for strict proof thereof.

VII.

Answering unto the allegations of paragraph VII of said libel, respondent denies that all and singular the premises are true, but admits, however, that they are within the admiralty and maritime jurisdiction of the United States and of this [12] Honorable Court.

And for a further and first affirmative defense, respondent alleges:

VIII.

That heretofore, to wit, on the 1st day of October, 1921, at about 5:35 o'clock in the morning of said day, the steam tug "San Joaquin No. 4" of 365 gross tons burden, of which respondent was the operator and managing owner, was standing down the Strait of Carquinez, a tributary of said San Francisco Bay, bound on a voyage from Sacramento River ports to Port Costa, a town on said Carquinez Strait; that said tug "San Joaquin No. 4," was at said time towing four barges, also operated by said respondent as the managing owner thereof, of which the barge "Tennessee" was one; that said barge "Tennessee" was at said time loaded with a valuable cargo of grain to wit, about 13,000 sacks of barley; that said Carquinez Strait is a tortuous and narrow body of water, being in places less than 1000 yards in width through which runs a tidal current of great force, particularly on the ebb of the tide; that there is a large amount of water traffic, consisting of river steamers, tugs and barges, constantly passing up and down the said Strait.

IX.

That at said time on said morning of October 1st, 1921, the said British steamship "Ravenrock" was lying at anchor in the fairway in said Strait on the northerly side thereof, near Dillon Point, in such a manner and position as to obstruct the passage of tugs and barges standing down the river; that on [13] or about said time said steam tug "San Joaquin No. 4" with said barges in tow, including the barge "Tennessee," bound on said voyage to Port Costa, rounded the turn in said Strait opposite the town of Benicia, and stood down said Strait to Port Costa; that by reason of the obstruction of said strait caused by the anchoring of said British steamship "Ravenrock" in the manner and place aforesaid, said steam tug with its tow was unable to maneuver safely in said Strait and to make a landing at the wharf of Port Costa, or to pass said British steamship and proceed down the Strait; that said barge "Tennessee" in tow of said tug came into collision with the anchor chain and bow of said British steamship "Ravenrock" causing said barge "Tennessee" to sink and to lose her cargo of sacked barley.

X.

That said steam tug "San Joaquin No. 4" and said barge "Tennessee" were, at the time of beginning said voyage, and at all times thereafter until the time of said accident, in all respects in a good and seaworthy condition, properly manned, equipped and supplied, and that said collision was

not due to any fault, negligence, want of care, or omission on the part of respondent, or of said steam tug "San Joaquin No. 4," or of said barge "Tennessee," but was due wholly to the negligence of said British steamship "Ravenrock" in anchoring in said Strait as hereinbefore set forth, and to the failure and neglect on the part of said British steamship "Ravenrock" to take the necessary steps to prevent said collision.

XI.

That respondent has been informed and believes that the said British steamship "Ravenrock" was, at the time of said accident and now is, owned by His Majesty King George V. of the United [14] Kingdom of Great Britain and Ireland, and is not subject to arrest; respondent further alleges that said British steamship "Ravenrock" has departed from the Northern District of California and is not now within the said district or within the jurisdiction of this court, for all of which reasons it is impossible to bring the said British steamship "Ravenrock" into this action as a third party under the 56th Rule in Admiralty. Respondent alleges, however, that heretofore, to wit, on the 7th day of October, 1921, respondent, suing on behalf of itself and as bailee of 13,000 sacks of barley, the cargo of said barge "Tennessee," commenced an action *in rem* in this court to recover from the said British steamship "Ravenrock" the damages to respondent and to said cargo due to said collision; that in said action a stipulation was filed by the British Consul-General at San Francisco, wherein it was stipulated

that the British Government should pay or cause to be paid unto the libelant in said action, any and all damages, including costs, that might be adjudged or awarded against said steamship on the trial of said action, or on the appeal thereof; that said action is now pending in this Court.

And for a further and second affirmative defense, respondent alleges:

XII.

That at the time of said collision between said barge "Tennessee" and said British steamship "Ravenrock" on said first day of October, 1921, there was on board said barge "Tennessee," among other cargo, 9853 bags of barley; that 4561 bags of said barley had been shipped on board said barge "Tennessee" on or about September 23d, 1921, by one J. F. Bedwell at Cellis, California, to be delivered to Strauss & Company at Port Costa, [15] California (Notify E. Salz & Sons); that 5292 bags of said barley had been shipped on board said barge "Tennessee" on or about September 23d, 1921, at Wood's Brake, California, by one J. F. Bedwell, to be delivered to Strauss & Company, Port Costa, California (Notify E. Salz & Sons).

XIII.

That said 9853 bags of barley were shipped on board said barge "Tennessee" pursuant to the terms of two bills of lading, identical in form, which were at the time of said shipment, issued by respondent and signed by the shipper; that said bills of lading provided *inter alia* as follows:

"Dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted; with the privilege of reshipping in whole or in part on steamboats or barges; also with the privilege of towing with one steamer, at the same time, between Sacramento and San Francisco, down or up, two or more barges, either loaded or empty."

that said barley was transported by respondent on said barge "Tennessee" pursuant to said contracts of affreightment and not in pursuance of any contract of towage or any other contract whatsoever.

XIV.

That at the time said barley was received for shipment on board said barge "Tennessee" and at the time of the commencement of said voyage to Port Costa with said barley on board, said barge "Tennessee" was in all respects, seaworthy, properly manned, equipped and supplied; and that said steamer "San Joaquin No. 4" was at all of said times, in all respects, seaworthy, properly manned, equipped and supplied; that said barge was, while carrying said barley on said voyage, operated by respondent, together with said steamer "San Joaquin No. 4," as a single carrier of goods and [16] merchandise for hire and that at none of said times was there any contract of towage existing between the said steamer and said barge, or between respondent and the libelant or between respondent and

the owners of any of the cargo on the barge "Tennessee."

XV.

That if any act on the part of the master and/or the officers and/or the crew of said steamer "San Joaquin No. 4" and/or said barge "Tennessee," at or about the time of said collision on said first day of October, 1921, in any manner contributed to the collision, or to the damage due to said collision, such act was an act of navigation or management, for which respondent is not liable under the provisions of the act of Congress, approved February 13th, 1893, known as the Harter Act.

And for a further and third affirmative defense, respondent alleges:

XVI.

That if any act on the part of the master and/or officers and/or crew in charge of the said steamer "San Joaquin No. 4," and/or the barge "Tennessee," at the time of said collision, in any manner contributed to said collision or to the damage to the cargo of barley on board said barge "Tennessee," said act was, by reason of the conditions existing at that time, as hereinbefore set forth, an act *in extremis* for which respondent is not liable.

WHEREFORE respondent prays that the libel herein may be dismissed and that respondent may recover its costs from the libelant.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent. [17]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

H. H. Sanborn, being duly sworn, deposes and says: that he is an officer, to wit, the secretary of the Sacramento Navigation Company, a corporation, respondent in the foregoing entitled action, and makes this verification as such officer in behalf of said respondent; that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and, as to those matters, he believes it to be true.

H. H. SANBORN.

Subscribed and sworn to before me this 28th day of December, 1921.

[Seal] E. M. CLARK,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is hereby admitted this 29th day of Dec., 1921.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Dec. 29, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the Southern Division of the United State District Court, in and for the Northern District of California.

First Division.

In ADMIRALTY.—No. 17,354.

Before: Hon. M. T. DOOLING, Judge.

SACRAMENTO NAVIGATION COMPANY,
Libelant,

vs.

The British Steamship "RAVENROCK", her engines, boilers, tackle, etc.,
Respondent.

SHIPOWNERS & MERCHANTS TUGBOAT COMPANY,
Third Party.

MILTON H. SALZ, doing business under the name of E. SALZ & SON,
Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,
Respondent.

(TESTIMONY)

Friday, June 16, 1922.

Counsel Appearing:

F. W. DORR, Esq., Proctor for Sacramento Navigation Co.,

E. B. McCLANAHAN, Esq., Proctor for Milton H. Salz,

J. B. McKEON, Esq., Proctor for British Steamship "Ravenrock."

T. C. THACHER, Esq., Proctor for Ship-owners & Merchants Tugboat Company.

Mr. McCLANAHAN.—I suggest, if your Honor please, that these cases be consolidated for trial. It has been agreed, subject [19—1] to your Honor's approval, that the case of Sacramento Navigation Company v. the "Ravenrock" be tried first, that is, that the testimony in the latter case be put in first. I understand, of course, that under the order of consolidation that will give the libelant in the case of Salz v. Sacramento Navigation Company the right of cross-examining the witnesses.

Mr. DORR.—If your Honor please, these two cases arose out of a collision between a tug towing four barges down the Sacramento River and through the Carquinez Straits, and the British Steamer "Ravenrock", which was anchored in Carquinez Straits, opposite Port Costa. The *libel* in the case of Sacramento Navigation Company v. the British Steamship "Ravenrock" is brought on behalf of the Navigation Company in its own right

and as bailees of the cargo of the barges. I will state there were about 13,000 or 14,000 bags of barley on one of the barges which was lost as a result of this collision. That libel was filed as bailee of the cargo and on behalf of the Navigation Company to recover the "Ravenrock" the damage due to the collision. In that libel it was alleged that the "Ravenrock" was anchored in the Straits of Carquinez opposite Port Costa, in a position that would obstruct the usual and customary path of tugs and tows standing down Carquinez Straits, bound for Port Costa, to make a landing on an ebb tide. We will show that on an ebb tide it is necessary to keep well to the northward of the center of the channel and make a wide swing in order to head upstream and land alongside the dock at Port Costa. The answer to that libel denies that there was any fault on the part of the "Ravenrock," and alleges there was neglect navigation on the part of the tug and tow. There is a cross-libel on behalf of the "Raven-
[20—2] rock to recover for damages which the "Ravenrock" claims were caused by the collision, injury to the brake on the windlass, and the expense of the tow to put her back in her former position. The "Ravenrock" filed a petition to bring in the Shipowners & Merchants Tugboat Company, on the ground that the "Ravenrock" was anchored in that position by a tug of the Shipowners & Merchants Tugboat Company, and that the fault, if any, was on the part of the Tugboat Company. The Tugboat Company has answered denying liability. The Salz case is a libel by the owners of the barley

against the Sacramento Navigation Company, to recover for the loss of the barley, and it is alleged that it was due to the negligent navigation on the part of the "San Joaquin No. 4" and the barges. In answer to that the Navigation Company has pleaded that the fault, if any, was on the part of the "Ravenrock" in anchoring so as to obstruct the channel, and alleging that the "San Joaquin No. 4" and the barge "Tennessee," which was the barge that came into collision, were properly manned and supplied, and equipped, and that under the Harter Act they are not liable; also that by reason of the circumstances pleaded, the act, if any, causing the collision, was an act *in extremis* for which the Navigation Company is not liable. The corporate capacity of the libelant Sacramento Navigation Company is admitted, and it is also admitted that the "Ravenrock" was lying in the stream, lying in the bay of San Francisco at the time the suit was brought.

TESTIMONY OF BERNARD J. DOLAN, FOR RESPONDENT.

BERNARD J. DOLAN, Called for the Sacramento Navigation Company; sworn.

Mr. DORR.—Q. What is your business?

A. Steamboat captain.

Q. By whom are you employed?

A. The Sacramento Navigation [21—3] Company.

Q. On what vessel?

A. The "San Joaquin No. 4."

(Testimony of Bernard J. Dolan.)

Q. How long have you been on the "San Joaquin No. 4"? A. About 10 years.

Q. Master of that vessel?

A. Master since 1916.

Q. How long have you been navigating the Sacramento River? A. About 14 years.

Q. And the San Francisco Bay and tributaries?

A. Between 10 and 12 years, off and on.

Q. What papers do you hold, what license?

A. Master and pilot for San Francisco Bay and tributaries to the head of navigation on the Sacramento River.

Q. Were you in command of the " San Joaquin No. 4" on October 1, 1921? A. Yes.

The COURT.—What is the "San Joaquin No. 4"?

Mr. DORR.—The "San Joaquin No. 4" is a stern wheel steamboat.

Q. Where was the "San Joaquin No. 4" at that time, the morning of October 1?

A. Port Costa.

Q. Did she have a tow?

A. A tow of four barges.

Q. Just describe the tow, how it was made up, and the size of the barges?

A. We had the "Vermont" and the "Tennessee," the "Riverside," and the "Richland"; the two head barges were about 230 feet long by 46 feet wide; and the two last barges about 160 feet long by about 36 feet wide.

Q. Were you towing these astern of the "San Joaquin No. 4"?

(Testimony of Bernard J. Dolan.)

A. Yes, astern, one behind the other.

Q. How close were the barges to each other?

A. 6 feet apart.

Q. The No. 1 barge, you said, was the "Vermont"? A. "Vermont." [22—4]

Q. How far astern of the "San Joaquin No. 4" was the No. 1 barge? A. About 200 feet.

Q. How did you tow it; how was it connected to the "San Joaquin No. 4"? A. By wire cable.

Q. What was the length of the "San Joaquin No. 4"? A. 163 feet.

Q. What was the total length of your tug and tow—approximately; I do not mean in exact feet.

A. About between 300 and 400 yards, I think.

The COURT.—Were they tandem?

A. Tandem, yes.

Mr. DORR.—Q. Where was that tow made up?

A. Sacramento.

Q. Where were you bound?

A. For San Francisco, stopping at Port Costa.

Q. Stopping at Port Costa? A. Yes.

Q. What speed would the "San Joaquin No. 4" make with the four barges in tow, in still water, loaded as they were on that morning?

A. About four knots.

Q. How were the barges loaded?

A. Do you mean how deep they were loaded?

Q. No, with what cargo? A. Grain.

Q. Heavily loaded? A. Heavily loaded, yes.

Q. Were all the barges?

(Testimony of Bernard J. Dolan.)

A. All except the last barge, that was an empty oil barge.

Q. Captain, what was the condition of the "San Joaquin No. 4" on September 30, 1921, as to seaworthiness? A. First-class condition.

Q. Will you state whether or not she had been inspected? A. Yes, she was.

Q. By the United States Inspectors? A. Yes.

Q. Prior to that time? A. Yes.

Q. When was she inspected?

A. September 23.

Q. 1921? A. Yes. [23—5]

Q. Were any repairs ordered? A. No.

Q. At that time was all of the equipment in the way of boats, life preservers, and fire extinguishers, and one thing and another required by the navigation laws, in place? A. Yes.

Mr. McKEON.—If your Honor please, that is objected to upon the ground that it is leading and suggestive. I think the witness ought to testify.

The COURT.—The objection will be overruled.

Mr. DORR.—Q. What was the condition of her stearing gear? A. Good condition.

Q. Did you inspect the stearing gear personally?

A. No, but I tried it and found it all right.

Q. You stated that you left Sacramento the day before, or did you state? A. Yes.

Q. On September 30th? A. Yes.

Q. And arrived at Port Costa on October 1?

A. On October 1.

Q. Was she in the same condition when approaching Port Costa? A. Yes.

(Testimony of Bernard J. Dolan.)

Q. As she was when you left Sacramento?

A. Yes.

Q. What crew did you have on board the "San Joaquin No. 4" when you left Sacramento on that voyage, officers and crew?

A. We had about ten deck hands, captain, and pilot, two engineers, two firemen, two Chinese cooks, two barge pilots.

Q. Were they on the "San Joaquin"?

A. There were three deck hands on the barges and two barge pilots on the barges.

Q. Did you have a mate?

A. A mate and a watchman.

Q. Mate and a watchman?

A. On the steamer.

Mr. DORR.—At this time, if your Honor please, I offer in evidence a certified copy of the certificate of inspection of the "San Joaquin No. 4," dated September 26, 1921, to show the [24—6] complement which is required by the United States Inspectors on board this vessel.

Mr. McCLANAHAN.—I understand it is offered to show what it required, and not compliance.

Mr. DORR.—And also that there was an inspection made on September 26, 1921.

(The document was marked Libelant's Exhibit 1.)

Q. You stated that you had a pilot as well as a master. What watches did you stand on the "San Joaquin No. 4"? A. Six on and six off.

Q. Who stood the watches?

(Testimony of Bernard J. Dolan.)

A. I stood one and the pilot the other.

Q. Did you stand a regular watch, that is, the same hours every day? A. Yes.

Q. What was your watch? A. 6 to 12.

Q. P. M.? A. Yes.

Q. And 6 to 12 A. M.? A. Yes.

Q. What watch did the other pilot stand?

A. 12 to 6.

Q. Who was the pilot? A. Manuel Cifuentes.

Q. When you stood watch on the "San Joaquin No. 4" who steered the vessel?

A. I steered it myself.

Q. Was that in the pilot-house? A. Yes.

Q. Just describe the construction of the pilot-house on the "San Joaquin No. 4," where was it located? A. Forward, on the upper deck.

Q. And how was the front of the pilot-house built, round or straight across?

A. Straight across.

Q. Did it have windows, open windows?

A. Open windows around, which could be opened or closed.

Q. State whether or not there was a clear and unobstructed view [25—7] from that pilot-house?

A. Clear, yes, very clear.

Q. Was there anything ahead to obstruct the view? A. Nothing.

Q. When the pilot was on watch did he also steer the vessel? A. Yes.

Q. Are you familiar with the custom among towboats on the Sacramento River, generally, aside from your own towboats? A. Yes.

(Testimony of Bernard J. Dolan.)

Q. Will you state whether or not the watch which you were standing on the "San Joaquin No. 4" was the customary watch on river towboats?

A. Yes, I think it was, so far as I know.

Mr. McKEON.—That is objected to as wholly incompetent, and having nothing to do with the issues in the case, what the custom is on other boats.

The COURT.—The objection will be overruled. Is there any contention on the part of anybody that the watches are too long?

Mr. DORR.—No, your Honor.

The COURT.—What difference does it make?

Mr. DORR.—Q. When the "San Joaquin No. 4," with her tow of four barges reached Port Costa on the morning of October 1, who was on watch?

A. The pilot.

Mr. McCLANAHAN.—Was that before or after the collision?

Mr. DORR.—When she was approaching Port Costa.

Mr. McCLANAHAN.—Approaching?

Mr. DORR.—Yes, before the collision.

Q. I call your attention to a chart marked Salz vs. Sacramento Navigation Company Libelant's Exhibit "A" attached to the deposition—

Mr. McCLANAHAN.—Has that deposition been offered in evidence yet?

Mr. DORR.—No, it has not. That is your deposition.

Mr. McCLANAHAN.—We do not propose to offer it in evidence. [26—8] The circumstances

(Testimony of Bernard J. Dolan.)

under which the deposition was taken were these: It was taken before suit was brought, taken in a hurry in our office, before we had the facts or knew much about this case. Afterwards the deposition of the same man was taken in the other suit which was brought before our case, and that man was there, and examined by Mr. Griffiths at great length, and the deposition taken there contains all that is in ours and more, and we have a stipulation that we may use that deposition, so we do not propose to offer this one in evidence.

Mr. DORR.—It was offered in connection with the deposition in the Salz case, and has been used in connection with the examination of other witnesses. It was used on the taking of the deposition of Captain Shartzer, whose deposition I expect to offer. It was previously offered in connection with Mr. McClanahan's deposition. I would like to have this chart go in for that reason, even if no other part of the deposition is going in, as it has been used in connection with the other deposition.

Mr. McCLANAHAN.—I have no objection to your offering the chart, but to use it as part of the evidence taken under a deposition that we do not propose to offer, I do object. It is not in the case at all.

Mr. DORR.—I will use this chart and then I will offer it.

Mr. McKEON.—If your Honor please, may I inquire as to the purpose of showing this chart to the witness? There are a lot of courses of another

expert witness on it, and I would like to know the purpose of showing it to this witness.

The COURT.—I do not know.

Mr. McKEON.—I was inquiring of Mr. Dorr.

Mr. DORR.—I will show you in a minute, when I ask him a question. [27—9]

Mr. McKEON.—I ask that you refrain from showing the witness the map with the courses on it.

Mr. McCLANAHAN.—Is there not another chart identical with that offered on the examination of the same man, and whose deposition will be offered in evidence?

Mr. DORR.—Not with these subsequent marks on which were made by the other witness, to show the course of the vessel, tide and one thing and another.

Mr. McKEON.—Mr. Dorr, you assisted in the taking of the deposition of Captain Shartzer, and he wants to use that now for some purpose.

Mr. McCLANAHAN.—The marks on that were made by Captain Shartzer.

Mr. McKEON.—Yes.

Mr. DORR.—I have still another chart which has no marks on it, if you want me to use that I will.

Mr. McCLANAHAN.—I think you ought to use that.

Mr. DORR.—I don't see any use in putting three charts in.

Mr. McCLANAHAN.—This chart has marks on it, as you see, made by one of your witnesses, and

(Testimony of Bernard J. Dolan.)

unless it is going to be introduced in evidence it should not be used now if you have another chart, unless it is introduced. If it is in the case, all right.

Mr. DORR.—Q. Captain Dolan, I hand you a chart, being No. 5334, of Suisun Bay, a Government chart, showing the section through Carquinez Straits, and ask you if you will mark on that chart the location of McNear's Landing?

Mr. McCLANAHAN.—This is a new chart, is it?

Mr. DORR.—It is a new chart, has no marks on it, whatever.

Q. That point that you have marked "M" is McNear's Landing? A. Yes. [28—10]

Q. Is that the landing to which you were bound on the morning of October 1, 1921? A. Yes.

Q. Will you mark on that chart the course that you would have to take on an ebb tide with the "San Joaquin No. 4" and the four barges in tow to make a landing at McNears?

Mr. McCLANAHAN.—I will have to suggest to counsel that the question include a strong ebb tide, as that is the allegation which is admitted in the pleadings.

Mr. DORR.—Extremely strong ebb tide.

Mr. McCLANAHAN.—Put it that way. In fact, a four or five mile tide, as one of the witnesses testified.

Mr. DORR.—Q. Will you just mark that line "C," your course? A. Yes.

Q. Now, Captain, will you indicate by another

(Testimony of Bernard J. Dolan.)

line on that chart the direction of the tidal current through Carquinez Straits, on an extremely strong ebb tide? A. Yes.

Q. Will you mark those lines "T"?

A. Yes. The tide sets out in cross-currents off this ferry slip down here—sets right across.

Q. Will you please mark on the chart the position where the "Ravenrock" was anchored on the morning of October 1, 1921, as near as you can judge?

A. She was drifting after the barge struck her.

Mr. McCLANAHAN.—Q. Dragging her anchor?

A. Yes.

Mr. DORR.—I offer this chart in evidence in connection with the examination of this witness, and ask that it be marked Libelant's Exhibit 2.

(The chart was marked Libelant's Exhibit 2.)

Q. How was the tide on the morning of October 1, 1921? A. Ebb tide, strong ebb tide. [29—11]

Q. What part of the ebb?

A. About the middle of the tide.

Q. Was it an ordinary tide?

Mr. McKEON.—That is objected to upon the ground that it is leading, if your Honor please. Let him state what the tide was.

Mr. DORR.—Just state what the tide was.

The COURT.—Extremely strong tide is the stipulation. Do you want to make it any stronger or weaker than that?

Mr. McKEON.—Might I suggest there, so that we may not have an erroneous impression, Mr.

(Testimony of Bernard J. Dolan.)

McClanahan's suggestion on that was that the witness called by Mr. Dorr testified as to that tidal condition.

The COURT.—No, he said it was admitted.

Mr. McKEON.—He said the witness testified, as I understood it.

The COURT.—No, he said that was the allegation and the pleadings admitted a strong ebb tide.

Mr. DORR.—Your own pleadings admit that, Mr. McKeon, and your witnesses testified to it.

Mr. McKEON.—They testified it was a strong ebb.

Mr. McCLANAHAN.—I also said that there was one witness who testified that it was a four or five mile tide.

Mr. DORR.—Q. What was the situation there when you first came on deck on the morning of October 1, 1921?

A. The barge had struck the ship, and was hanging on the bow of it.

Q. What barge?

A. The "Tennessee," the second barge.

Q. Where was the "San Joaquin" at that time?

A. She was just below there, just after she parted her towline.

Q. What happened after that?

A. I turned the boat around and took the last two barges away from the other ones. [30—12]

Q. What became of the "Tennessee"?

A. She hung there until we docked the two last barges.

Q. In what condition was the "Tennessee"?

(Testimony of Bernard J. Dolan.)

A. She was sunk at that time.

Q. What became of the cargo?

A. Slipped overboard, washed overboard.

Q. Captain, what would you say from navigating the Straights of Carquinez and the Sacramento River, and the San Francisco Bay and tributaries, as to the difficulty of navigating the Carquinez Straits in comparison with the other sections of water I have mentioned? Do you get the question?

A. There is a very heavy cross-current at that particular place.

Q. Is it difficult to navigate there?

A. Yes, it is.

Q. Have you ever seen any vessel anchor opposite Port Costa in the channel?

A. I have seen them anchor in the Straits, but not there in that particular cross-current.

Q. Where have you seen them anchor?

A. Below there or way above there.

Q. Will you just indicate on this chart, Libelant's Exhibit 2, where you have seen them anchor, with the letter "A"?

A. I have seen them anchor all along at different places through here.

Q. You are now referring to the point below the section west of Dillon's Point?

A. No, I have not seen any anchored in there.

Q. That is between Dillon's Point and Benicia Ferry?

A. I have seen them anchored up here.

Q. That is opposite the town of Martinez?

(Testimony of Bernard J. Dolan.)

A. Well, no, not up that far; in here, just a little below Martinez.

Q. Just put an "A" there on the chart, so that we will know [31—13] what you are referring to. You have never seen any between Benicia and Dillon's Point? A. No.

Q. Captain, how many barges were you in the habit of towing with the "San Joaquin No. 4"?

A. Four most of the time, sometimes five; we have towed five or six.

Q. Was this four-barge tow a usual tow with your boat?

A. Yes, the usual tow with four barges.

Q. State how the "San Joaquin No. 4" compares with the average river towboat, as to power?

Mr. McKEON.—Might I inquire there as to whether you are talking about stern-wheel towboats, or what?

Mr. DORR.—River boats of the same type.

A. The most powerful stern-wheel boat on the river, I think.

Q. Did you handle the "San Joaquin No. 4" after the collision with the "Ravenrock"?

A. Yes, after six o'clock, I came on watch.

Q. What was the condition of the "San Joaquin No. 4" at that time as to her steering gear and other equipment? A. In very good condition.

Q. Did it handle all right? A. All right.

The COURT.—Q. What was the hour of the collision? A. Between 5 and 6.

Mr. DORR.—You may take the witness.

(Testimony of Bernard J. Dolan.)

Cross-examination.

Mr. McKEON.—Q. Is that as close as you can come to the time of the collision?

A. I should judge about 5:30.

Q. Where were you at the time of the collision?

A. In bed.

Q. On the "San Joaquin"? A. Yes.

Q. Where was your room located?

A. Forward, on the upper deck.

Q. Right off the pilot-house?

A. Right below the pilot-house. [32—14]

Q. Right below the pilot-house? A. Yes.

Q. So that you would have to climb the companionway to get to the pilot-house?

A. Come up one flight of steps.

Q. Is that an enclosed pilot-house? A. Yes.

Q. What time did you go off watch the night previous? A. A little after twelve o'clock.

The COURT.—Are you representing the Navigation Company?

Mr. McKEON.—No, your Honor, we are representing the "Ravenrock."

Mr. DORR.—I represent the Navigation Company.

The COURT.—And Mr. McClanahan the cargo?

Mr. McCLANAHAN,—Yes. And Mr. Thatcher the Red Stack Towboat Company, that placed the "Ravenrock" at anchor. I should have said I represent the interested cargo.

The COURT.—You are the man who lost the barley and wants to get his money from somebody, and does not care much from whom?

(Testimony of Bernard J. Dolan.)

Mr. McCLANAHAN.—Practically. I gave it to the towboat man, and he has not given it back to me. So he is the man I am after primarily.

Mr. THATCHER.—Not the Red Stack Towboat Company?

Mr. McKEON.—Q. Mr. Dolan, what other towboats have you been on other than the "San Joaquin No. 4"?

A. The "San Joaquin No. 2," the "Jacinto," the "Dover," and "Red Bluff."

Q. They are owned by the Sacramento Transportation Company? A. Yes.

Q. Have you ever been on any other stern-wheelers, other than the Sacramento Transportation Company vessels? A. One other.

Q. In whose employ?

A. It was the Alviso, operated by the Producers Transportation Company. [33—15]

Q. So that you have practically been in the employ of the Sacramento Navigation Company during the whole period of time? A. Yes.

Q. And you are in their employ now? A. Yes.

Q. The "Vermont" was the first barge?

A. Yes.

Q. The "Tennessee" the second barge?

A. Yes.

Q. The "Richland" the third?

A. The "Riverside."

Q. What was the empty barge?

A. The "Richland."

Q. Were they all square barges? A. Yes.

(Testimony of Bernard J. Dolan.)

Q. What did you have holding each barge to one another, a cable?

A. Six-inch guy lines and seven-inch tow lines.

Q. Did the guy lines run diagonally?

A. To tow lines between the timber heads, seven-inch lines, and then two guy lines from the corners.

Q. What were they fastened to, the bitts?

A. The two lines to the timber heads and the guy lines to the cavil.

Q. Which of those barges hung up on the bow of the "Ravenrock"?

A. The "Tennessee," the second barge.

Q. Then the tug and the first barge cleared the vessel? A. Yes.

Q. And the second one hung up? A. Yes.

Q. How was she hung up, broadside?

A. Well, almost amidships, broadside, yes.

Q. Did the tow line on the "San Joaquin" part before you got up there?

A. Yes, it had parted.

Q. When you got up there? A. It was parted.

Q. What happened to the first barge?

A. They anchored the first barge.

Q. Who was on the first barge?

A. One of the barge pilots.

Q. Who was on the second barge?

A. I don't know.

Q. Who was on the third barge?

A. I don't know. [34—16]

Q. Who was on the last barge?

A. I don't know.

(Testimony of Bernard J. Dolan.)

Q. Did the "San Joaquin" drift down alongside of the "Ravenrock" after the towline parted?

A. She drifted on down and turned around and came back.

Q. Did you take the wheel?

A. No, I went in the pilot-house after that; I never took the wheel.

Q. Who was in the pilot-house when you went in there? A. The pilot.

Q. You did not take the wheel from him, did you?

A. No, I stayed there with him.

Q. You stayed there with him? A. Yes.

Q. And then you turned around with the "San Joaquin"? A. Yes.

Q. Then what did you do?

A. We took the two last barges away from the ship, away from the "Tennessee" and docked them.

Q. How did you get to that position?

A. Turned around and went alongside of them.

Q. Turned around, which side of the "Ravenrock" did you go?

A. We went around the northerly side of her.

Q. And the "Ravenrock" was tailing downstream, was she not? A. Yes, she was.

Q. So that you went around the stern and went up on the port side?

A. I don't remember now. I think we went around the other side.

Q. You went around the starboard side?

A. Yes.

Q. In other words, you made a turn out in the channel? A. Yes.

(Testimony of Bernard J. Dolan.)

Q. At that time, what was the condition of the barge "Tennessee" when you got up there?

A. She was sunk, the grain was under water.

Q. Was she listed?

A. Listed a little to one side. [35—17]

Q. Still had some grain on board? A. Yes.

Q. Then did you go around the "Tennessee" and make fast to the barges, the two last barges?

A. Yes, and took them away.

Q. How were they tailing, along on the port bow of the "Ravenrock"? A. Yes.

Q. The first barge was around right under the starboard bow of the "Ravenrock," on the anchor?

A. No, it had drifted quite a ways below.

Q. Drifted down?

A. Drifted down, and anchored, and then the "Ravenrock" dragged her anchor and got closer to it.

Q. Then the "Tennessee" and the two barges on the port bow drifted down with the "Ravenrock," did they? A. Yes.

Q. They were hung up on the bow when you came out? A. Yes, they were hung on the bow.

Q. Did you make any effort to get the "Tennessee" off that bow, or did you just go to the two last barges and make fast to them?

A. That is all we could do; we could not take them all off.

Q. What did you do?

A. We just took the two last barges.

(Testimony of Bernard J. Dolan.)

Q. And you paid no attention to the "Tennessee"?

A. Not until we got rid of the others.

Q. Did the "Tennessee" drift off of her own accord, or did you pull the "Tennessee" off the bow?

A. She drifted off; we came back alongside and she drifted off.

Q. She drifted off? A. Yes.

Q. Now, when you started to tow those two barges that were hung on the port bow, you started to tow them across the bow of the "Ravenrock"?

A. Well, they were kind of riding the same way, had swung down almost parallel with the "Ravenrock," and we shoved them right across toward the other shore. [36—18]

Q. That is, toward the Port Costa side?

A. Yes.

Q. And across the bow of the "Ravenrock"?

A. Yes.

Q. Did either one of those barges, when you started to pull them across the bow of the "Ravenrock" bring up on the bow of the "Ravenrock"?

A. No, but they caught on the "Tennessee," on the timber head of the "Tennessee," the last barge did.

Q. The last barge caught on to the "Tennessee" which was lying on the bow of the "Ravenrock"?

A. Yes.

Q. Then your maneuver was to tow those two barges across the bow of the "Ravenrock"?

A. Yes.

Q. Then the second barge caught on the bow of the "Tennessee"?

(Testimony of Bernard J. Dolan.)

A. Just caught there for a little while; it came right off again, we pulled it off.

Q. At that time you have placed the position of the "Ravenrock" where she had drifted.

The COURT.—He has not marked that.

A. No, I never marked that.

The COURT.—He was asked to mark the place where it was anchored, and he said when he saw it it had drifted, and did not mark anything.

Mr. McKEON.—She was down closer when you saw her to Dillon Point?

A. Yes, she was drifting closer all the time.

Q. With her anchor dragging? A. Yes.

Q. How was the "Ravenrock" headed?

A. Headed a little toward the Port Costa shore, heading up to that cross-current.

Q. Her bow was facing your approach?

A. Yes.

The COURT.—What time are you speaking of now?

Mr. McKEON.—When she was anchored, if your Honor please.

The COURT.—He did not see her when she was anchored.

Mr. McKEON.—At the time that you saw her, her bow was [37—19] heading toward your original approach? A. Before we struck her?

Q. Yes.

A. Yes, she was heading against the tide.

Mr. McCLANAHAN.—Q. She was heading upstream? A. Yes.

(Testimony of Bernard J. Dolan.)

The COURT.—You say before you struck her. I understood you to say you had not seen her at that time.

A. I understood him to mean whether she was still heading the same way as she was before we struck her.

Q. How do you know how she was heading before you struck her?

A. On account of the tide, I know she must have been.

Q. She must have been headed that way on account of the tide?

A. She would swing to the tide with one anchor.

Mr. McKEON.—Q. So that the starboard side of the "Ravenrock" would be closer to the Port Costa shore? A. Yes.

Q. And the port side of the "Ravenrock" would be toward the Benicia shore? A. Yes.

Q. And your after barges, your two after barges, would swing down the port side of the "Ravenrock," and the "Tennessee" across the bow, and the leading barge around the starboard bow of the "Ravenrock"? A. It had broken loose.

Q. But she would be around the starboard bow, with the "San Joaquin" on the starboard side of the "Ravenrock"? A. Yes.

Q. Just where is your pilot-house located on the "San Joaquin No. 4" with respect to its position abaft the stem?

A. It is on the upper deck, I don't know just how far aft from the bow, quite a little ways.

(Testimony of Bernard J. Dolan.)

Q. Quite a little ways? A. Yes.

Q. Was the "San Joaquin" loaded?

A. Just enough to trim her, yes.

Q. What did you have on her?

A. I don't remember just what [38—20] the cargo was.

Q. Where did you have it?

A. On the bow, and a little in the freight room.

Q. On the bow and in the freight room?

A. Yes.

Q. What cargo did you have on the bow?

A. I don't know what the cargo was; I don't remember what cargo we had.

Q. Where is your freight room located?

A. About amidships.

Q. Where did you discharge the cargo that you had on the "San Joaquin"?

A. I don't remember when we discharged it—where we discharged it.

Q. Where did you take it on?

A. Sacramento.

Q. Did you have any cargo of barley on that trip?

A. I don't remember just what the cargo was; it was pretty well mixed up.

Q. Would you say you had a general cargo on the "San Joaquin"?

A. I don't know just what it was.

Q. When you got into the pilot-house the only person there was the pilot? A. Yes.

Q. And you did not leave the pilot-house, you remained right there until after you placed all of the barges?

(Testimony of Bernard J. Dolan.)

A. I stayed in the pilot-house most of the time. I think I went downstairs once, I am not sure about that.

Mr. McCLANAHAN.—Q. You have made that trip before with barges, haven't you? A. Yes.

Q. Do you know of the Shipping Board vessels that are anchored across from Port Costa?

A. Yes.

Q. Did you ever pass them at night? A. Yes.

Q. Coming down? A. Yes.

Q. You passed them at night coming down?

A. Yes.

Q. You have seen their lights? A. Yes.

Q. How far can you see those Shipping Board lights at night [39—21] coming down?

A. It all depends; sometimes it is a little smoky, you cannot see them very far.

Q. On this particular night of the accident, it was a clear night, was it not, or a clear morning?

A. It was clear when I went to bed.

Q. I think we will show that it was a clear night or morning. Now, how far could you see on a clear night the Shipping Board lights coming down?

A. I never took any notice how far off.

Q. Could you approximate it by a reference to where your vessel was with reference to points along the shore?

A. Well, I never paid any particular notice to them; they are anchored away inside on the flats, out of the way, so that I never paid much attention to them.

(Testimony of Bernard J. Dolan.)

Q. Do you think you could see them two miles? Could you see them as far away as Martinez?

A. I do not think you could see them from Martinez, on account of that turn, there.

Q. Couldn't you see them from Martinez?

A. No; we come down closer there.

Q. Closer to shore?

A. Closer inshore, and then we make the turn.

Mr. DORR.—Q. You are indicating the shore on the Benicia side, now, Captain?

A. Yes, we came down that way more.

Mr. McCLANAHAN.—After you have reached this Benicia point here then you see the lights of the Shipping Board anchored vessels, do you not?

A. Yes.

Q. On clear nights? A. Yes.

Q. Captain, with a strong ebb tide, and four barges coming down at that point, the maneuver to make Port Costa is a rather difficult one, is it not?

A. Yes.

Q. Who was responsible for the maneuver on this particular occasion? Who had been put in charge of the making of that [40—22] maneuver? A. The man on watch.

Q. What is his name?

A. The pilot, Cifuentes.

Q. Do you generally leave to a man that happens to be on watch the making of a difficult maneuver? A. As long as he is on watch.

Q. Do you know now what maneuver this pilot attempted to make?

(Testimony of Bernard J. Dolan.)

A. Yes, I have an idea he went down and turned around facing the tide.

Q. You have an idea of the maneuver he attempted to make?

A. Well, I did not see it, but that is what we have been doing right along.

Q. Do you know, from what happened and from what you saw after you came up what the pilot attempted to do? A. Well, I could not tell you.

Q. Or are you confused on that?

A. I don't know.

Q. You don't know what he attempted to do?

A. Well, everything was piled up there when I got up, so I could not say.

Q. Could you tell whether he attempted to make the maneuver before reaching the anchored vessel or after he had passed the anchored vessel?

A. I could not tell you, no.

Q. You could not tell? A. No.

Mr. McCLANAHAN.—Is the pilot available, is he going to testify?

Mr. DORR.—He is here.

Mr. McKEON.—Q. Did the pilot, after the collision, tell you what he had tried to do?

A. I don't recall whether he did or not.

Q. Did you ever ask him what he tried to do?

A. I do not believe that I did, no.

Q. Captain, were you in charge of the "San Joaquin No. 4," when she picked up the two last barges, or was the pilot in [41—23] charge?

A. Do you mean at Sacramento?

Q. No, at the wreck, after the collision.

(Testimony of Bernard J. Dolan.)

A. He was in charge.

Mr. McKEON.—Q. He was in charge?

A. Yes.

Q. So he made the second maneuver that resulted in a successful docking at Port Costa of the two rear barges? A. Yes.

Q. Was that maneuver also accompanied by a collision with the anchored vessel?

A. I did not get you.

Q. The first maneuver was accompanied by a collision with the "Ravenrock." Now, was not the second maneuver with the two rear barges also accompanied by a collision with the "Ravenrock"?

A. We had to take them away from there, yes.

The COURT.—In the taking of them away did you have another collision with the "Ravenrock"?

A. Not in taking away the two barges, no.

Mr. McKEON.—Q. But they did hang up on the "Tennessee," one of them?

A. Yes, caught a corner, and let go again.

Q. Did you have anything to do with the taking away from the "Ravenrock" of the first barge?

A. No, the pilot was still on watch.

Q. He was still on watch? A. Yes.

Q. Had you reached the pilot-house at that time?

A. Yes, I had been in the pilot-house.

Q. Then the "San Joaquin No. 4," in charge of the pilot, after you came up from below, took from the collision, the place of collision, the first barge, did it not?

The COURT.—The "Vermont."

Mr. McKEON.—The "Vermont."

(Testimony of Bernard J. Dolan.)

A. The "Vermont" was anchored when I got up; it had already drifted below and anchored.

Q. You did not have anything to do with the maneuver that took the "Vermont" away?

A. No. [42—24]

Q. Do you know whether there was a collision with the "Ravenrock" when the "Vermont" was taken away after the collision with the "Tennessee"? A. No.

Q. You don't know that?

A. Not that I know of.

Mr. DORR.—The testimony does not show that the "Vermont" was taken away by the steamer. The "Vermont" broke away and anchored.

A. She was anchored when I got up.

Mr. McKEON.—Q. Don't you know of a second collision after the collision with the "Tennessee," a collision which resulted in an attempt to dock one of the barges other than the "Tennessee"?

A. No; the "Tennessee" broke away from the "Ravenrock"; after she broke loose she went back on the bow again, but she got in an eddy and swung around again on the bow of the ship, the steamer could not prevent it.

Q. The "Tennessee," after she cleared herself, was picked up by the "San Joaquin No. 4," and in an attempt to dock her there was another collision of the "Tennessee"?

A. No, she broke adrift, and then she swung right around in the eddy, and went right around the ship, and hooked up again.

(Testimony of Bernard J. Dolan.)

Q. That was a part of the maneuver to dock her, was it not?

A. She had already drifted off when the steamer came alongside.

Q. She had drifted off and the steamer came along and picked her up, and in the maneuver to get her to land she again collided with the "Ravenrock," did she not?

A. The steamer could not do anything with her then, she was too heavy.

Q. She broke away from the steamer?

A. Broke away from the "Ravenrock" and hung up again in the same place; that was after she had sunk.

Q. The "Tennessee" then had a collision with the "Ravenrock" [43—25] by which she was partially submerged or wholly submerged?

A. Wholly submerged.

Q. And from that submersion she, herself, broke away, and the "San Joaquin" attempted to bring her to a dock?

A. No, attempted to get her away from the ship, but could not do it.

Q. In that attempt, she broke away from the "San Joaquin No. 4" again and collided with the bow of the anchored ship? A. Yes.

Q. So there were two collisions. I knew there were, but I did not know whether it was the "Tennessee" or some other boat. Who was in charge of your steamer, the "San Joaquin No. 4" when the first attempt was made to handle the "Tennessee" in her sinking condition?

(Testimony of Bernard J. Dolan.)

A. The pilot was still in charge, and—

The COURT.—Q. Did he do all of this in half an hour?

A. I don't know as it just took a half hour.

Q. You said the collision was about 5:30, and you went on watch at 6 o'clock.

A. We call it 6 o'clock; we go on after having breakfast; I did not go on until after breakfast.

Q. When did you go on?

A. Why, I didn't go on until after this was over.

Q. He did all there was to do?

A. Yes. I was up there with him most of the time.

Q. But he was doing the maneuvering?

A. Yes.

Mr. McCLANAHAN.—Q. You are the master of the "San Joaquin No. 4" are you? A. Yes.

Q. Have you ever, as master, docked barges at Port Costa? A. Yes.

Q. You, yourself? A. Yes.

Q. From where the "Ravenrock" was when you saw her, was there [44—26] plenty of room between her and the Port Costa shore for the "San Joaquin" and her line of barges to pass down the stream?

Mr. DORR.—When he saw her when?

Mr. McCLANAHAN.—Q. I am asking him when he first saw her was there room for the "San Joaquin" to pass between the anchored drifting vessel and the shore?

A. Yes, she was drifting toward the shore all the time, drifting in all the time to the other shore.

(Testimony of Bernard J. Dolan.)

Q. What do you mean by "the other shore," the Benicia shore? A. The Benicia shore.

Q. Then there was plenty of room. You can answer my question "Yes" or "No." A. Yes.

Q. Have you not been told by the pilot where the "Ravenrock" was anchored before the collision?

A. I could not say the exact spot, no.

Q. Do you mean to say you have not been told the exact spot? A. He told me about.

Q. He told you about where she was anchored?

A. Yes, without pointing it out. I could not go and pick out the place he told me. He just said "About in there."

Q. When he said "About in there," you recognized, did you not, where she was anchored?

A. Yes.

Q. Well, now, from the point where you recognize from what was said by the pilot of where the "Ravenrock" was anchored to the Port Costa shore, was there not plenty of room for the "San Joaquin No. 4," with her four barges, to pass down the stream in perfect safety?

A. If we held down the other shore all the way down we could have passed.

Q. Plenty of fairway? A. Yes.

Mr. McKEON.—May I ask a few more questions? [45—27] Did you contemplate discharging these barges at Port Costa, that is, your men?

A. Yes, they had stevedores to do that work there; they leave the barges there.

Q. In charge of your men?

A. In charge of the stevedores in Port Costa.

(Testimony of Bernard J. Dolan.)

Q. Do you remember what time you were called?

A. I was called right after the accident, right after.

Q. Who called you? A. The watchman.

Q. What is his name?

A. I can't remember his name. He is a Portuguese, John something.

Q. Is he here? A. No, he is not here.

The COURT.—Q. You got up right away, did you, when called? A. Yes.

Q. You were called right after the accident?

A. Yes.

Q. When you got out was it light or dark?

A. It was light.

Mr. McCLANAHAN.—Counsel has asked for one question that calls for another question from me: Captain, you knew when you commenced this voyage from Sacramento that you would have to make this maneuver at Port Costa on a strong ebb tide, did you not? A. Yes.

Mr. THACHER.—Q. You made a report of this accident to the United States Inspector, didn't you? A. No, I never made any.

Q. Why not?

A. I was told that it was not necessary. I did not think it was necessary.

Q. You did not think it was necessary?

A. No.

Q. As master, you know whether or not it is necessary for a master to make reports of accidents of this kind, where it runs into thousands of dollars, to the inspectors, don't you?

(Testimony of Bernard J. Dolan.)

A. No, I didn't know that it was. [46—28]

Q. How long have you been a master?

A. I have been master of that boat since 1916.

Q. And of other boats? A. Yes.

Q. Don't you know that you are called upon to make a report to the inspectors when you have an accident of any substantial kind?

A. I thought anybody connected with the company, the head of the company, could make the report.

Q. Don't you know the master had to make the report?

A. Well, in different accidents, yes, but I didn't think this was necessary.

Q. You have made reports before for other accidents, haven't you? A. Yes.

Q. Whenever you had an accident previously you have made a report to the United States Inspectors, haven't you? A. Yes.

Q But in this particular case you saw fit not to make a report to the inspectors: That is right, is it not?

A. I did not see any necessity of making a report.

Q. Although you knew the damage might have been some $15,000?

A. I did not know what it run to. I figured it was not a collision on account of the other boat being anchored.

Q. It was not a collision because the boat that was hit was anchored. That is the reason you did not make a report to the United States Inspectors: That is right?

(Testimony of Bernard J. Dolan.)

A. Well, I did not think it was necessary to make a report.

Q. You testified as to the position of the ship when you were called, and as to what happened then. I understood, in answer to the last question of the Court, it was light when you came out?

A. Yes.

Q. You could see perfectly well as to what you testified to? A. Yes. [47—29]

Q. No trouble at all about seeing?

A. Breaking daylight.

Q. It was light? A. Yes.

Q. You could see perfectly well? A. Yes.

Mr. DORR.—Q. Captain, was it broad daylight?

A. No, it was just like it was breaking day, just coming daylight.

Q. And for the purpose of navigation, were any men stationed on any of the barges except No. 1 barge?

Mr. McKEON.—I object to that as immaterial.

The COURT.—The objection will be overruled.

A. I could not say whether there was or not. There was supposed to be one on each barge, any way.

The COURT.—Whose duty is it to see that they are there?

A. The barge pilot looks after the men on the barge.

Q. Is there a barge pilot for each barge?

A. There are two barge pilots; they stand watch six on and six off on the head barge.

Q. It is their duty to see that they have men?

(Testimony of Bernard J. Dolan.)

A. Yes.

Q. That the men that should be aboard the barge are there? A. Yes.

Mr. DORR.—Q. Did you hear any people yelling to you from the "Ravenrock," when you were trying to get these two barges loose? A. Yes.

Q. Weren't they yelling to you to take the two barges away? A. Yes.

Q. To cut them loose? A. Yes.

Q. Was there any cargo on the bow of the "San Joaquin No. 4" that interfered with the view from the pilot-house? A. None.

Q. How often do you make a trip past Port Costa?

A. We make the round trip twice a week from Sacramento.

Q. Do you always land at Port Costa?

A. Pretty near every trip. [48—30]

Q. When you are on watch you have charge of the landing? A. Yes.

Q. When the pilot is on watch, then he has charge? A. He has charge.

Q. Is it part of your duty to keep track of cargo?

A. The mate keeps track of the cargo.

Q. Calling your attention to the chart Libelant's Exhibit 2, will you mark in Southampton Bay a line showing where the Shipping Board ships were lying?

Mr. McCLANAHAN.—What chart is that?

Mr. DORR.—The same one.

Mr. McCLANAHAN.—The one that I objected to?

(Testimony of Bernard J. Dolan.)

Mr. DORR.—No.

Mr. McCLANAHAN.—You said Libelant's Exhibit 2.

Mr. DORR.—Introduced in this case this morning.

Mr. McCLANAHAN.—I beg your pardon.

Mr. DORR.—Q. Mark a straight line across there showing the outer limits of the Shipping Board ships.

A. They are anchored in here, in these flats, here, inside of there.

Q. Inside of the shaded portion?

A. I could not say just how far out they come, but they are anchored up in this cove here.

Q. Mark that "S"; that is the outer limit that you have indicated there? A. Yes.

Q. In coming down the Straits above Martinez, above Benicia, does the Benicia ferry pierhead cut off a view below there up into Southampton Bay? A. Yes.

Q. I will ask you whether or not, if you were coming down close to the shore above Benicia, it is possible to see the lights in Southampton Bay until you have cleared the Benicia ferry pierhead?

A. You cannot see them until you get clear of the pier. [49—31]

Q. This pilot that you had on the "San Joaquin No. 4" at the time of the accident was a licensed pilot? A. Yes.

Mr. McCLANAHAN.—Isn't he going to be called?

(Testimony of Bernard J. Dolan.)

Mr. DORR.—Yes.

Mr. McCLANAHAN.—Why ask this witness?

Mr. DORR.—Wait a minute. I will get to that.

Q. You said how long you had been on the river?

A. Yes.

Q. How many years? A. About 14 years.

Q. During that time, have you had occasion to see many pilots at work on the river? A. Yes.

Q. Are you, from your experience, in a position to form an estimate of whether a man is a skillful pilot, or otherwise? A. He is a skillful pilot.

Mr. McKEON.—I move to strike that answer out on the ground it is not responsive, and on the further ground that he is not competent to testify.

The COURT.—Let it go out as not being responsive.

Mr. DORR.—Will you read the question. (Last question repeated by the reporter.) That can be answered "Yes" or "No."

A. Yes, he is.

Q. From your experience—

Mr. McKEON.—Just a minute. He has answered "Yes, he is." I move to strike out "he is."

The COURT.—Let it go out. He is going to answer it finally "he is," so it might as well go in now.

Mr. McKEON.—If that is your Honor's ruling—

The COURT.—Of course, if you want to travel the whole road, or cut across roads, it is immaterial to me. I will let the answer go out.

Q. You say that you are familiar and can say whether [50—32] a man is an experienced pilot or not? A. Yes.

(Testimony of Bernard J. Dolan.)

Mr. McCLANAHAN.—I would like to ask some questions on that point of qualification.

The COURT.—All right, proceed.

Mr. McCLANAHAN.—Q. What is the work you have done and seen done in connection with the piloting of these barges by a pilot that makes you qualified to testify as to a pilot's qualification?

Mr. DORR.—Not the pilot of the barge, the pilot of the steamer.

Mr. McCLANAHAN.—I am not talking about the barge pilot now. Let us find out whether we are talking about the same thing. I am talking about the pilot, the kind of pilot that was on the "San Joaquin" at the time of this collision.

A. Yes, I have seen him—

Q. (Intg.) Make mistakes?

A. Land barges and make up tows and dock them.

The COURT.—And bring them down the river?

A. Yes.

Mr. McCLANAHAN.—Q. You have seen him do that? A. Yes.

The COURT.—He is talking about this fellow.

Mr. McCLANAHAN.—No, he is talking about the other fellow.

The COURT.—He has said he saw this pilot do this work.

Mr. McCLANAHAN.—Q. You have seen pilots do this particular work? A. Yes.

Q. And, seeing them, you have passed judgment upon whether they do it correctly, or not?

A. Yes.

(Testimony of Bernard J. Dolan.)

Q. And the matter of the qualification of the pilot depends upon whether you, yourself, are qualified, doesn't it? A. Yes.

Mr. DORR.—I do not get that. [51—33]

Mr. McCLANAHAN.—Q. That is, they do work in piloting as you would do it? A. Yes.

Q. That is all you know about it, is it not?

A. Yes.

The COURT.—I understand him to say they do it successfully, too.

Mr. McCLANAHAN.—But he did not do this successfully.

The COURT.—He did not do this at all.

Mr. McCLANAHAN.—No, but the pilot did not do it successfully.

The MASTER.—That is what the quarrel is about. That is the very thing we are trying here, and we are traveling in a circle.

Mr. McCLANAHAN.—I object on the ground he is not qualified.

The COURT.—The objection is overruled.

Q. He is, is he? A. Yes.

The COURT.—Now go on.

Mr. McKEON.—Q. Whether you are in position so as to see the Shipping Board lights on the vessels up on the flats depends on your position approaching the Benicia pierhead?

A. I think it does.

Q. If you are out in the channel there towards the Port Costa side and not hugging the Benicia pierhead, or hugging the other side of the Benicia pierhead, you can see these Shipping Board lights?

(Testimony of Bernard J. Dolan.)

A. I think you would have to be pretty well over to the other shore.

Q. To the other shore? A. Yes.

The COURT.—After you are around the corner there, how far is it to where the vessels are anchored? A. About a mile.

Q. You could keep out of the way in that distance, couldn't you? A. Yes. [52—34]

The COURT.—I think that was the purpose of your question, to see whether he could see the lights far enough away to keep out of the way.

Mr. McCLANAHAN.—I have not any question before the Court.

The COURT.—No, but you asked him about seeing the Shipping Board lights.

Mr. McCLANAHAN.—Yes, I wanted to see how far away he must be before he could see the lights.

The COURT.—You will argue if he saw the Shipping Board lights he should have seen the "Ravenrock's" lights.

TESTIMONY OF MARSHALL CIFUENTES, FOR RESPONDENT.

MARSHALL CIFUENTES, called for the Sacramento Navigation Company; sworn.

Mr. DORR.—Q. What is your occupation?

A. Steamboat pilot.

Q. Working for the Sacramento Navigation Company? A. Yes.

Q. Pilot on the "San Joaquin No. 4"?

A. Yes.

(Testimony of Marshall Cifuentes.)

Q. Were you the pilot in charge of the "San Joaquin No. 4" on October 1, 1921? A. Yes.

Q. At the time of this collision? A. Yes.

Q. What has been your experience as a river pilot? A. In years, you mean?

Q. Yes, in years, and over what waters.

A. Pretty near seven years, and a year and four months on the bay, and the rest up the river.

The COURT.—How many years?

A. About seven years.

Mr. DORR.—Q. What license do you hold?

A. Captain and pilot.

Q. How long have you held a license?

A. For about four years.

Q. That is, pilot's license and captain's license, combined? [53—35]

A. I had a pilot's license one year and then I got a captain's license.

Q. Since that time you have held both of them?

A. Yes.

Q. Did you hold that license at the time of this collision? A. Yes.

Mr. McCLANAHAN.—Which license?

Mr. DORR.—Pilot and master's license.

Q. Pilot and captain both, at the time of the collision?

A. Captain on the Sacramento River, and pilot down here.

Mr. McCLANAHAN.—Q. Captain on the Sacramento River? A. Yes.

Q. And pilot down where?

(Testimony of Marshall Cifuentes.)

A. Down on the Bay, San Francisco.

Mr. DORR.—Q. Did you run on the lower river, down here on the Straits any length of time before being licensed as a pilot? A. I ran one year.

Q. Have you landed many times at Port Costa?

A. Yes.

Q. State how often, approximately.

A. Well, every time it would be on my watch I would land; of course, you could never tell, sometimes we would leave Sacramento early and sometimes late.

Q. When you were on watch you handled the steamer yourself? A. Yes.

Q. When you landed, you handled the steamer?

A. Yes.

Q. Captain, on the morning of October 1, 1921, you were on duty. Will you just indicate on this chart, Libelant's Exhibit 2—

Mr. McKEON.—May I interrupt a moment. Have you the log of that vessel on that voyage?

Mr. DORR.—No.

Mr. McKEON.—I think we ought to have it for the examination of this witness. [54—36]

Mr. DORR.—Q. Did you keep the log-book?

A. No, the log-book is kept by the captain.

Mr. McKEON.—I demand the production of the log.

Mr. DORR.—There has been no mention of the log before this time.

Mr. McKEON.—This is the first collision case I have ever seen it was not in court.

(Testimony of Marshall Cifuentes.)

Mr. DORR.—Q. Referring to this chart, Libelant's Exhibit 2, opposite the town of Benicia, will you indicate on there the course that you came down with the "San Joaquin No. 4"?

Mr. McKEON.—May I suggest, if your Honor please, that we take another chart. I will furnish it.

The COURT.—All right.

Mr. DORR.—That makes four now.

Mr. McKEON.—I do not want the witness shown a chart with the course already laid down.

Mr. DORR.—Q. What was the condition of the weather when you were off Benicia?

A. Right off Benicia, dark.

Q. What time was it?

A. About 5:15—about 5:25.

Mr. DORR.—I would like to have this marked for identification Libelant's Exhibit 3.

Q. On this chart which is marked Libelant's Exhibit 3, which I will offer in connection with the examination of this witness, will you indicate the course of the "San Joaquin No. 4" opposite the town of Benicia by drawing a line? A. Yes.

Q. Continue your line on down past the Benicia ferry slip. A. Yes.

Q. After passing the ferry slip, indicate your course.

A. That is to make the round-to for the ebb tide.

Q. Will you mark that? That is the line on the chart marked "C"? A. Yes.

Q. How was the tide that morning?

(Testimony of Marshall Cifuentes.)

A. Ebbing. [55—37]

Q. Strong? A. Strong ebb tide, yes.

Q. What time, if you remember, did you pass the Benicia ferry slip?

A. Around 5:25, almost 5:30.

Q. Was it daylight at that time?

A. No, it was dark—it was the break of day.

Mr. DORR.—I will offer this chart in evidence in connection with the witness' testimony and ask that it be marked Libelant's Exhibit 3.

(The document was marked Libelant's Exhibit 3.)

Q. Will you just state what happened after you passed the Benicia ferry slip?

A. Yes; after I passed the Benicia ferry slip I seen one light in the dark, I couldn't make out any outline of the boat, and as I came along a little further, you know, we could make out the outline of the steamer, and then I crossed over this way; I saw I could not make it below the steamer, and I crossed over the bow.

Q. Toward which shore? A. Toward McNear's.

Q. When did you first see that light?

A. After I rounded the ferry slip, after I passed the ferry slip at Benicia.

Q. Was it possible to have seen a light above the ferry slip? A. No.

Q. How many lights did you see?

A. I saw one light.

Q. What was the appearance of that light?

A. The appearance, you could hardly make it

(Testimony of Marshall Cifuentes.)

out; I was looking for side lights; it was more like, from a long distance it was more like a headlight; then, at another time, it looked like the light on the tail of a tow going down.

Mr. McKEON.—If your Honor please, I want to call your Honor's attention to the fact that there is no charge in the libel of improper lights on the vessel, and I think this testimony [56—38] would be irrelevant, incompetent, and immaterial for that reason.

The COURT.—I don't know. It is a question of whether he saw them or not.

Mr. DORR.—Q. At the time you first saw the light, could you see the hull of any vessel?

A. No.

Q. How soon after that did you see the hull?

A. It must have been about—I went down about half a mile there.

Q. Will you mark on this chart, Libelant's Exhibit 3, which you have already made a line on, a cross showing the position of the "Ravenrock" at that time, according to your best judgment?

A. Right here.

Q. The "Ravenrock"?

A. No, that is where I seen her—the "Ravenrock" was right in here.

Q. Where is McNear's landing on that chart?

A. Here.

Q. Will you mark an "M" there? A. Yes.

The COURT.—Was she below the landing?

A. She was right here, opposite here (pointing).

(Testimony of Marshall Cifuentes.)

Q. Headed this way?

A. Yes, this is the stern.

Q. Stern toward you?

A. No, stern this way.

Q. You are coming down the stream? A. Yes.

Q. Which is the bow of the "Ravenrock"?

A. Here is the bow here, upstream.

Mr. DORR.—Q. When did you first see the hull of the "Ravenrock"? A. Right here.

Q. At the point marked "X" on the pencil line?

A. Yes.

Q. What did you do then?

A. When I was down here I saw that I could not make it here, on account of Dillon's Point, and I crossed right here.

The COURT.—Q. You could not make what?

A. I could not [57—39] make the turn to go around the stern of the ship without getting on the rocks.

Q. What were you trying to do?

A. We had to come around that way to pass her.

Q. What were you trying to do?

A. I was trying to pass her.

Mr. DORR.—Q. How did she lay with respect to the direction of the stream? Did she lay up and down the course?

A. Across the channel, up with the current—headed up to the current, but across the channel.

Q. Where was her stern pointing toward?

A. Toward Dillon's Point.

Q. Could you, with a tug and four barges in tow,

(Testimony of Marshall Cifuentes.)

pass between her and the north side of Carquinez Straits? A. No.

Q. Why not?

A. The tide would set me down all the time, there, and I could not pass.

Q. If you had gotten by the "Ravenrock" on the north side, could you have gotten by Dillon's Point?

A. If I got by—no, I could not clear Dillon's Point.

Q. As soon as you saw the vessel there, state what you did?

A. As soon as I saw the vessel, after I made it out, I tried to get in close to the dock, and right there, where I saw the vessel at anchor, I knew where she was anchored is right where the tide sweeps around from the ferry slip—

Q. Indicate on the chart where the tide sweeps down. A. Yes; the tide shoots right over.

Q. That is, over into Southampton Bay?

A. Yes.

Q. Will you draw a line there showing that sweep of the tide? A. Yes.

Q. The line that is marked "T" on the chart?

A. Yes; this would be the line if you wanted it. [58—40]

The COURT.—Is it this, or that?

A. This is the line here.

Mr. DORR.—Q. Then what happened to you after you started to head across toward the Port Costa side?

(Testimony of Marshall Cifuentes.)

A. After I headed across she settled right down on top of the ship.

Q. What settled down? A. The whole tow.

Q. State what happened then.

A. Well, when the whole tow settled down there, I was going like that and she collided with the steamer, the second barge hit, and then the first barge broke loose from the second barge, the tow line broke on the boat, the tow line broke on the first barge, and that went on down the creek, and I hollered to the pilot to anchor, to throw an anchor out; then I called the captain up and he came up on deck and I rounded to and went and got the two barges, and led them over to California.

Q. You are referring to the California wharf at Port Costa? A. Yes.

Q. Where does that lie with reference to McNear's? A. Right below McNear's, 50 feet.

Q. Have you ever seen a ship anchored where the "Ravenrock" was? A. No.

Q. How much of the channel did you need to make the turn to land at Port Costa on the ebb tide?

A. It would take about 1500 feet, that is, to make a good turn, without crimping the barges.

Q. Could you turn short? A. No.

Q. Why not?

A. It would break the tow lines between the barges.

Q. On your customary track to Port Costa, on

(Testimony of Marshall Cifuentes.)

an ebb tide, state whether or not the "Ravenrock" was obstructing that path? A. Yes.

Mr. McKEON.—I move to strike that out on the ground it [59—41] calls for the conclusion of the witness, and the matter that the Court has to pass upon.

The COURT.—No. The objection will be overruled. What is your answer?

A. Yes, she was in the way.

Mr. DORR.—Q. When you came down to the "Ravenrock," did you see anyone on board?

A. I saw one man on board, that is all.

Q. Where did you see him?

A. He was running up to see what we were going to do.

Q. Running up from where?

A. From the stern of the boat—about amidships —he ran up toward the bow. I just happened to get a glimpse of him, that is all, and it stayed in my memory, I don't know why.

Q. When you were coming down to the "Ravenrock," was she head-on to you, or did you have a broadside view?

A. I had a broadside view.

Q. How many lights did you see burning?

A. One.

Q. At the time that you came down to the "Ravenrock," how was the light then, as regards daylight? A. It was just breaking day.

Q. How was the "Ravenrock" painted?

(Testimony of Marshall Cifuentes.)

A. Painted battleship gray; I guess that is a dull gray.

Q. What sort of a background was there on that side of Carquinez Straits?

A. It was all hills, dark.

Q. Dark hills? A. Dark hills, hollows, yes.

Q. State whether or not it was difficult to see a vessel with that background?

A. Yes, it is difficult to see it, you can see the lights, but you cannot see the vessel.

Q. What happened to the "Tennessee" after the collision?

A. When we hit there, the "Tennessee" was caught on the anchor chain, and she would not let go, she kind of capsized a little; [60—42] after we had taken the two barges off the ship drifted down to Dillon's Point, and when we came back the "Tennessee" had already let go, and got in an eddy, and she went right around the ship again, we could not hold her, it was such a strong ebb there, and during that time they had thrown another anchor out to hold the steamer "Ravenrock," and she went right back to the identical same place again, and struck up again.

Q. Was there more than one collision?

A. There were two collisions there.

Q. That was when the "Tennessee" was being taken away from the ship?

A. Yes, she came right around and had another collision.

(Testimony of Marshall Cifuentes.)

Q. What, then, was the condition of the "Tennessee"?

A. She was all the way down, all the way submerged.

Q. Was she opened up?

A. Yes, she was cut right in half to the pilothouse.

Q. What condition was her cargo in?

A. The cargo was away under water.

Q. Any of it gone overboard.

A. Yes, a lot of it went overboard at the first accident.

Q. Going back to the place where you were when you rounded the Benicia pierhead, the ferry pierhead and saw that light, I will ask you at that time, as you were standing down the straits, whether it was possible for you to do anything in the way of navigating and maneuvering the "San Joaquin" and her tow other than you did do? A. No.

Mr. McKEON.—I object to that on the ground that it is not competent.

The COURT.—The objection will be overruled.

Q. I understand you could not pass to the north side, and you tried to pass to the south?

A. Yes, the left-hand side [61—43] coming down.

Mr. DORR.—Q. What was the combined speed, that is, with the tide, what speed was the "San Joaquin" making over the ground?

A. Between 8 and 9 knots.

Q. Was it possible for her to slow down?

(Testimony of Marshall Cifuentes.)

A. If she had slowed down it would have been worse.

The COURT.—Q. As I understand your testimony, you tried to pass between Port Costa and this vessel? A. Yes.

Q. You got the "San Joaquin" and the "Vermont" by? A. Yes.

Q. The sweep of the tide across the straits swung the other barges around so that the "Tennessee" hung up on the anchor chain of the "Ravenrock"?

A. Yes.

Q. And the other two swung on by? A. Yes.

Mr. DORR.—That is all.

Cross-examination.

Mr. McKEON.—Q. You were in the pilot house?

A. Yes.

Q. I understood you to testify that you had a pilot's license for San Francisco Bay? A. Yes.

Q. And a captain's license for the river at the time of this collision? A. Yes.

Mr. DORR.—Q. That is San Francisco Bay and tributaries? A. To the head of navigation.

Mr. McKEON.—Q. Have you ever been to sea?

A. No.

Q. During the time that you have been on San Francisco Bay and tributaries, have you been in the employ of the Sacramento River Transportation Company? A. Yes.

Q. And you are in their employ now? A. Yes.

Q. What did you start in as?

A. Well, I was fireman, deckhand, on deck, till

(Testimony of Marshall Cifuentes.)

I served my three years, and served a year in the pilot-house as a cub pilot, until I got my license. [62—44]

Q. You say you served three years on the deck?

A. No, you have got to serve three years, altogether before you get a pilot's license.

Q. You served three years on the deck?

A. Yes.

Q. When did you start in?

A. It must have been 1916.

Q. You started in in 1916?

A. Yes, around that time.

Q. So that that carried you up till 1919?

A. Well, no, as I said, I worked on deck in 1916, and when you work on deck you don't work steady, sometimes you work two or three months, and other times four or five months.

Q. What were you doing in the meantime?

A. Working around different places, down in Sacramento.

Q. You started in with these people in 1916?

A. Yes.

Q. And you worked in this off-and-on way for a period of three years?

A. No, when I worked, if I worked two months I added that two months on to the next time I worked.

Q. So that your period of apprenticeship, so to speak, in order to get your license, ran over a longer period of time than three years. A. Yes.

Q. Just how long?

(Testimony of Marshall Cifuentes.)

A. That is something I could not say; I worked for the Naponsett, and then I came to this company.

Q. In 1920 you were getting your license, then, as a master? A. Yes.

Q. You were filling out your time to get it?

A. Yes.

Q. When did you get your master's license, in what year?

A. It must have been about two or three years ago.

Q. What year was it?

A. That is something I never looked up.

Q. Haven't you got it?

A. No, my papers are on the boat.

The COURT.—Q. How long had you had it before this occurred? A. The Master's? [63—45]

Q. Yes.

A. I had the pilot's license down here before the thing occurred four months.

Mr. McKEON.—Q. How long had you had your master's license?

A. It must have been a little over two years, two and a half years.

Q. Then at the time of this collision you were serving as a cub pilot?

A. No, I was a pilot; I had a pilot's license.

Q. At that time you had it for four months?

A. For four months; it takes a year running down here before you get a license, a year cubbing.

Q. How is the pilot-house of the "San Joaquin No. 4" constructed, just describe it?

(Testimony of Marshall Cifuentes.)

A. It has steam steering gear.

Q. Where is your compass?

A. There are two compasses, port and starboard compass, right there on both corners of the pilot-house.

Q. Where is your wheel?

A. The wheel is amidships of the pilot-house, right in the middle.

Q. Did you steer a compass course coming down?

A. Sometimes you do and sometimes you do not; it depends upon how you steer, how the tide is, and how the wind is.

Q. Were you steering a compass course at this time? A. No, not at this time.

Q. Dead reckoning? A. Dead reckoning.

Q. How large a wheel have you got?

A. Steering wheel?

Q. Yes,—a small steering wheel?

A. The wheel is about as high as a person—8 or 9 feet in diameter.

Q. How far astern of your pilot-house window is your wheel, or abaft your pilot-house window is your wheel? A. It is only about three feet.

Q. And you stand behind that wheel?

A. Yes. [64—46]

Q. How high is the wheel, did you say?

A. About 8 or 9 feet.

Q. 8 or 9 feet?

A. But that goes down in the floor, below the pilot-house; it isn't 8 or 9 feet high in the pilot-house, it sets down a chute.

(Testimony of Marshall Cifuentes.)

Q. What time did you go on watch that night?

A. At twelve o'clock.

Q. You were alone in the pilot-house? A. Yes.

Q. What sort of a day was it previously?

A. It was a calm day.

Q. Was it hot? A. I could not remember.

Q. Did you sleep the day previous? A. Yes.

Q. As you came down you hugged the shore opposite the Port Costa side, that is, you were hugging the Benicia shore?

A. Yes, about 100 feet from the shore.

Q. About 100 feet from the shore? A. Yes.

Q. How close to the Benicia dock did you pass that dock? A. About 100 feet.

Q. About 100 feet off? A. Yes.

Q. Did any of your tows have any difficulty in rounding the dock?

A. Well, when we come around our tow settled down all the time.

Q. They all cleared the dock? A. Yes.

Q. When you rounded that dock you saw this light that you have described? A. Yes.

Q. And you continued on your course?

A. Continued down till I saw what it was.

Q. After you got down fairly close to it—

A. (Intg.) About a mile from it.

Q. About a mile from it, you changed your course to go across the bow of the vessel? A. Yes.

Q. At that time were you making a maneuver to dock at Port [65—47] Costa, or were you making a maneuver to clear that vessel?

(Testimony of Marshall Cifuentes.)

A. At the time I started to cross?

Q. Yes.

A. I was making a maneuver to get around that ship, to go below it and round-to.

Q. That is, you were making a maneuver to go down around the stern of the "Ravenrock" and then make your swing? A. Yes.

Q. You were not at that time making a maneuver to make your swing and get into Port Costa?

A. No.

Q. And the course that you have laid down on that chart, Libelant's Exhibit 3, is, as far as you can recall, your course on that morning? A. Yes.

Q. And, according to your best recollection, that is the position that you recall the "Ravenrock" was lying? A. About a mile from here.

Q. But you are quite sure that is the position of the "Ravenrock"?

A. Yes, that is the "Ravenrock."

Q. Now, was the "Ravenrock" lying in a position between the Port Costa shore and a line drawn between Dillon's Point and the Benicia dock?

A. Yes.

Q. She was? A. Yes.

Q. You are positive of that?

A. Well, I am not absolutely positive, but I know the stern was lying toward Dillon's Point.

Q. That is, after she dragged?

A. No, when I came down, after I made the outline of the boat out, she was in such a position that I could not get around there.

(Testimony of Marshall Cifuentes.)

Q. That is, she was in such a position that you could not go between her and the Southampton Bay shore? A. Yes.

Q. You could not go between?

A. No, and clear Dillon's Point—I could go down there, but I would pile on the rocks.

Q. Did you call the captain?

A. I had the watchman call him. [66—48]

Q. How long after the collision was it that you told the watchman to call him?

A. Right away, but, you see, the towline had broken on the first barge, and I hollered to the barge pilot to throw out the anchor, and the watchman happened to come up, and I hollered to him to call the captain, and he was up immediately.

Q. What speed were you making before you rounded the Benicia dock?

A. The same speed, between 8 and 10 miles.

Q. You made that same speed all the way down?

A. Yes, on that ebb tide, because that tide from the Suisun deep water channel comes out in an awful spring tide.

Mr. DORR.—Q. Indicate on the chart where the Suisun deep water channel is.

A. You see, this is the deep water channel here, and it runs awful fast.

Q. That is marked "D"?

A. Yes; it comes around here, that is the deep water channel, the left-hand shore.

Mr. McKEON.—Q. You stayed in the pilothouse of the "San Joaquin" all the time?

(Testimony of Marshall Cifuentes.)

A. Yes.

Q. Is there any back to that pilot-house?

A. It is wide open in the back.

Q. What do you mean by "wide open," glass?

A. Glass.

Q. So that after your "San Joaquin No. 4" crossed the bow of the "Ravenrock" and your first barge cleared, you looked astern, did you?

A. I was looking back once in a while.

Q. You were looking astern the whole time?

A. I was looking ahead, watching what I was doing, but they were setting down, and I had to look back once in a while.

Q. Where was the "San Joaquin"? What was the relative position of the "San Joaquin"?

A. She was right close to the dock, there. [67—49]

Q. The Port Costa dock?

A. The Port Costa docks.

Q. When did the towline break?

A. The towline broke after the barge "Tennessee" hit.

Q. After the barge "Tennessee" hit?

A. Yes; you see, she stopped kind of dead still and gave a kind of jerk.

Q. Then where did the "San Joaquin No. 4" go?

A. She went ahead; as soon as I knew the towline broke, I could tell, I stopped her, and then when I stopped her I began to back up around, and the first barge passed by us, and I hollered to

(Testimony of Marshall Cifuentes.)

the barge pilot to drop an anchor, and I was going back to the ship to see what had happened.

Q. How did you go back to the "Ravenrock"?

A. I went astern of her.

Q. And up on the port side?

A. Yes, on her port side.

Q. You went up between Dillon's Point and the "Ravenrock"? A. Yes.

Q. And around her, on the port side? A. Yes.

Q. When you got up there you found the "Tennessee" stil across the bow? A. Yes.

Q. You found two barges trailing down on the port bow? A. Yes.

Q. What did you do next?

A. I got hold of the two barges and shoved them ahead.

Q. That is, you made fast aft?

A. I got alongside of both of them and I shoved them ahead until we cleared the "Tennessee"; then I went over to California.

Q. You shoved them ahead to clear the "Tennessee" across the bow of the "Ravenrock"?

A. Across the bow of the "Ravenrock."

Q. Did either of those two barges come in contact?

A. Well, it got caught a little, the last barge got caught on top of the timberhead; the bow of the "Tennessee" was submerged, [68—50] just enough so that the barge got caught.

Q. Your "San Joaquin No. 4" was then astern of that last barge? A. No.

(Testimony of Marshall Cifuentes.)

Q. Was she pushing it? A. Shoving it.

Q. She was astern of that last barge that fouled the barge "Tennessee"?

A. You would not call it astern, we were alongside of the two barges, and that would make that last barge kind of astern.

Q. Were you fast to the two barges, have them lashed to your starboard side? A. Yes.

Q. You were just about in the center of the stern of one and the forward end of the other barge? A. Yes.

Q. You were swinging them around that way?

A. Yes.

Q. And the last one caught on the "Tennessee"?

A. Yes, caught.

Q. Did the "Tennessee" after that immediately release herself from the "Ravenrock"?

A. No, all of this time she drifted, and when we got over there, and when we got back she was fetched up at Dillon's Point.

Q. That is, the "Ravenrock" was drifting, and the "Tennessee" was going down drifting with her and this other barge? A. No.

Q. She was just drifting with the "Tennessee"?

A. Yes.

Mr. McCLANAHAN.—Q. What did you think the light was when you first saw it?

A. To tell you the truth, I did not know what it was; I was looking for side lights; there either had to be side lights or a ship going down stream; it kind of surprised me seeing any light there at all when I came around the bend at Benicia, so I was

(Testimony of Marshall Cifuentes.)

looking for side lights until I saw the outline of the ship, and then I knew there was a ship at anchor there, because you could see an outline of it. [69—51]

Q. Did you make any plan of maneuver between the time of seeing the lights first, and seeing the outline of the ship?

A. I came down my natural course, my natural way.

Q. You made no move on your maneuver—

A. No.

Q. (Continuing.) Until after you had seen the outline of the ship? A. Yes.

Q. After you had seen the outline of the ship did you know that the ship was anchored?

A. Yes, we could see the anchor—a dim outline.

Q. She was so close that you could see the chain?

A. No, you could see from the position that she was holding there that she was not going.

Q. That is, you could see that she was swinging to the tide?

A. The reason I knew that she was anchored was because there were no side lights there you could see.

Q. You did not decide that it was an anchored vessel until you saw her outline, did you?

A. No.

Q. That is right? A. Yes.

Q. You had made no maneuver, or made no plan for a maneuver until you saw her outline?

A. No.

(Testimony of Marshall Cifuentes.)

Q. What did you say you planned to do after you saw it was an anchored ship?

A. I tried to get ahead of her, get across her bow.

Q. Across her bow? A. Yes.

Q. How far away was she at that time?

A. About a mile.

Q. When you could see her? A. Yes.

Q. See her outline? A. Yes.

Q. I thought it was a mile you could see her lights.

A. I could see the light a mile and a half.

Q. I thought it was a mile that you saw this light. [70—52]

A. No, a mile and a half. It is a mile and a half to where we cross around the ferry slip. I will tell you where I am. It is a mile from here, and a mile and a half from up here.

Q. On this course, where were you when you saw the outline of the anchored vessel?

A. Right here.

Q. Right there? A. Yes.

Q. And it was there you commenced to maneuver? (Pointing to the cross.) A. Yes.

Q. Did you then and there determine to maneuver so as to make the landing at Port Costa?

A. No; after I saw that the vessel was at anchor I tried to get below her.

Q. You tried to get below her?

A. Yes, to come around here and then come below.

(Testimony of Marshall Cifuentes.)

Q. That is, to go between the vessel and Dillon's Point?

A. No, right here, below the ship, and to come back and make shore.

Mr. DORR.—That is on the Port Costa side?

A. Yes.

Mr. McCLANAHAN.—Q. What prevented you from taking your tug and tow between the anchored vessel and the Port Costa side?

A. Nothing prevented me.

Q. You could have done that without any trouble, if you wanted to? A. That is what I did.

Q. You mean that after you at "X" started to make this maneuver you crowded the Port Costa side? A. Yes.

The COURT.—Just lay off your course that you took after you discovered the vessel.

A. After I saw the vessel, I had to come in here, trying to pass, and I was going to come around down here.

Mr. McCLANAHAN.—Q. That was the course you were intending to take, was it Captain?

A. If the vessel was not there? [71—53]

Q. Yes. A. Oh, no.

Q. Not if the vessel was not there. After seeing the vessel, and seeing her outline, and knowing that she was anchored, was that line which you have marked there the course which you intended to take? A. Yes.

Q. Is that the course that the tide threw your barges over on to the anchored vessel? A. Yes.

The COURT.—Q. Where was the "San Joa-

(Testimony of Marshall Cifuentes.)

quin No. 4" when the "Tennessee" brought up on the "Ravenrock"? A. Right here.

Mr. McCLANAHAN.—Q. Use this pencil, please; that is too general, to say "right here."

A. She was down this way, about in here, the "San Joaquin No. 4."

Mr. McCLANAHAN.—I will mark this line which extends from "X," and which represents your course "a" and "b," and I will mark this, which you say was the position of the "San Joaquin No. 4" at the time of the collision.

The COURT.—At the time that the "Tennessee" brought up on the "Ravenrock."

Mr. McCLANAHAN.—At the time that the "Tennessee" was across the bow of the anchored ship, I will mark that "c." Then on this course from "X" the tide must sweep your string of barges, striking them on the port side? A. Yes.

Q. As you proceeded? A. Yes.

Q. How strong was the tide at that time?

A. The tide was running along, say six miles.

Q. You were going 8 or 9 miles? A. Yes.

Q. Then why did the tide outstrip your speed?

A. This was an awful strong tide in there.

Q. I know, but it is not 8 or 10 miles.

A. It was setting down all the time.

Mr. DORR.—He was going 8 or 9 miles over the ground. [72—54]

Mr. McCLANAHAN.—Let the witness testify.

Mr. DORR.—That is the testimony.

Mr. McCLANAHAN.—Q. Do you mean to say

(Testimony of Marshall Cifuentes.)

that the tide overcame the speed of your steamer and swept the barges on the port side down on to the anchored vessel? A. Yes.

Q. Wouldn't that have been the position of your towline all the way down from Army Point, say?

A. When you pass Army Point your towline is that way.

Q. Your towline follows this line C, does it not?

A. That is the course of the ship, but when you come down here the ebb tide sets it up on an angle.

Q. Did you know of these cross-currents and tides? A. Yes.

Q. You knew of their existence, did you?

A. I knew of them.

Q. Didn't you know that is what would happen if you attempted to pass?

A. But you could not do anything else; what could you do? You couldn't do anything else; that is the only way I could clear him, I couldn't go behind him, I had to go this way. That is the only chance I had of getting by there.

(A recess was taken until two o'clock P. M.) [73—55]

AFTERNOON SESSION.

MARSHALL CIFUENTES, cross-examination (Resumed).

Mr. McCLANAHAN.—Q. Captain, was your towing steamer a powerful boat? A. Yes.

Q. Did she have power sufficient to have made a landing of your barges there against the tide?

(Testimony of Marshall Cifuentes.)

A. Yes.

Q. So that if you had been below Port Costa you could have worked her up and made a landing?

A. Yes.

Q. Was she equipped with a search-light?

A. Yes.

Q. Those are very powerful search-lights, aren't they?

A. Not this one. This one is a kind of a dim one.

Q. Dim in comparison with some others?

A. Yes; that is not as powerful as some others.

Q. It was a search-light that was powerful for a river steamer, was it not?

A. Yes, it was pretty powerful.

Q. Did you use that search-light to locate objects along the shore? A. I never used it for that.

Q. You never used the search-light on your steamer?

A. We used it only when making a landing.

Q. Never used it otherwise? A. No.

Q. Couldn't you have used it on this boat?

A. No.

Q. Why not? A. Too far away.

Q. As you got nearer you could have used it?

A. Yes; when we got nearer it was daylight, and I did not need it.

Mr. McCLANAHAN.—I think that is all.

Mr. THACHER.—Have you brought in the log, Mr. Dorr?

Mr. DORR.—No, the log is in Sacramento. I did not know you wanted it.

(Testimony of Marshall Cifuentes.)

Mr. THACHER.—Could you have the log sent down, so that [74—56] at our option, we could stipulate it in evidence?

Mr. DORR.—We will have it for you.

Mr. THACHER.—No questions.

Mr. McKEON.—Q. Did you make a report of this accident to your owners? A. Yes.

Mr. McKEON.—I would like to see that report, please.

Mr. DORR.—I have no such report, that I know of.

Mr. McKEON.—I demand the production of it.

Mr. DORR.—It is not in our possession now. On what theory do you demand the production of it, Mr. McKeon?

Mr. McKEON.—As his report to his owners as to the facts.

Mr. DORR.—I know, but on what theory do you demand the production of that document?

Mr. McKEON.—Under the same right that I have to demand the production of any document relating to the facts in this case.

Mr. DORR.—I do not see that you have any right to.

Mr. McKEON.—I demand the production of it.

Mr. DORR.—It is to support your own cases.

Mr. McKEON.—Q. Captain, what distance off the Port Costa shore was the "San Joaquin" at the time the "Tennessee" was on the bow of the "Ravenrock"?

A. I should imagine about 100 feet.

Q. About 100 feet? A. Yes.

(Testimony of Marshall Cifuentes.)

Q. Do you know the width of that channel?

A. Well, in some places.

Q. What is the width, or what was the distance between the place where the "Ravenrock" was lying and the Port Costa shore?

A. Right there (pointing)?

Q. Yes.

A. It would be about 600 feet. [75—57]

Q. Six hundred feet?

A. Yes, 600 or 700 feet, maybe about 600 or 700 feet, about? Yes.

Q. Will you lay that distance off on the chart?

A. The distance of 600 feet?

Q. Yes, from the Port Costa docks.

A. What do you mean, accurately?

Q. Accurately, yes.

A. There is the Port Costa dock.

Q. You put down there the 600 feet from the Port Costa docks.

A. You mean measured in feet?

Q. The 600 feet.

A. I am guessing at it. I would not say it is exactly 600 feet; I say about 600 feet; I could not tell exactly what it was right there to a dot. I pretty near guessed it, anyhow, didn't I?

Q. Put down, if you will, please, the 600 feet from the dock at Port Costa, and mark it on that chart. A. There. Shall I put 600?

Q. Yes. A. Yes.

Q. What speed do you make, Captain, in still water, with the "San Joaquin"?

A. About 8 or 6.

(Testimony of Marshall Cifuentes.)

Q. Which is it, 6 or 8? A. Six.

Q. You make about 6 in still water?

A. Yes, still water, slight water.

Q. Is that miles or knots? A. Knots.

Q. What course would you ordinarily take to make a landing at Port Costa after rounding Benicia?

Mr. DORR.—Here is the chart he has been using.

A. To make the landing, you mean?

Mr. McKEON.—Q. To go where you wanted to go.

A. To land, go right around there (pointing).

Mr. DORR.—Q. The line you have marked "T" on the chart, isn't it?

A. Yes; that is, to go around here and over. [76—58]

Mr. McKEON.—Q. You would pull up against the ebb?

A. Get the nose of your boat in here, in slack water, and let the ebb tide set your barges around, and by that time you are in there.

Q. What is the starboard hand of that channel?

A. The starboard hand?

Q. For vessels coming up the stream.

A. Coming up this stream here.

Q. They hug the Port Costa shore? A. Yes.

Mr. DORR.—Q. The starboard hand going down, in the direction you are going.

A. No, this is coming up.

Q. I am talking about going down, the direction you were going. A. No.

(Testimony of Marshall Cifuentes.)

Q. The starboard hand is on the Benicia shore, isn't it? A. Yes.

Mr. THACHER.—You said that the watchman waked up the captain at your request? A. Yes.

Q. Is the watchman in court? A. No.

Q. The watchman was down on the lower deck of the tug, below the pilot-house?

A. He was down there waking the crew up; he goes down when we blow the whistle for the crew to get up, 15 minutes before making the landing. And of course, when there was a collision he ran right up.

The COURT.—Q. Had you already blown the whistle for the landing?

A. Yes, 15 minutes ahead of time.

Redirect Examination.

Mr. DORR.—Q. You said, in answer to a question of counsel, that you were steering by dead reckoning? A. Yes.

Q. As a matter of fact, weren't you steering from point to point? A. From point to point.

Q. That is what you meant?

A. Yes. [77—59]

Q. When the "Ravenrock" drifted down after the "Tennessee" collided with her, did the "Ravenrock" drift clear of Dillon's Point, or inside of Dillon's Point?

A. Clear, out in the channel a little.

Q. Outside? A. Yes.

Q. Did she drift straight down from her anchorage? A. Yes.

(Testimony of Marshall Cifuentes.)

Q. Will you just indicate on this chart the position of the "Ravenrock" after she stopped drifting?

A. Right in there.

Q. Mark that "R." A. Yes.

Q. Was that outside of Dillon's Point?

A. Yes. There is a little bight there that makes an eddy.

Mr. DORR.—That is all.

Recross-examination.

Mr. McKEON.—Q. Do you know what "dead reckoning" is? A. From point to point.

Q. Dead reckoning is from point to point?

A. Yes.

Q. That is what you understand dead reckoning to be? A. Yes.

Q. You have never been to sea, have you?

A. No.

Mr. McKEON.—That is all.

The COURT.—Q. Is that what it is known as on river boats?

A. Yes, that is what I take it for. [78—60]

TESTIMONY OF G. H. JOHNSTON, FOR RESPONDENT.

G. H. JOHNSTON, called for the Sacramento Navigation Company, sworn.

Mr. DORR.—Q. Mr. Johnston, what is your occupation? A. Barge pilot.

Q. On what barge?

A. On the forward barge, head barge.

Q. For what company?

(Testimony of G. H. Johnston.)

A. The Sacramento Navigation Company.

Q. Were you the barge pilot on the No. 1 barge that was towed by the "San Joaquin No. 4" at the time of this collision? A. Yes.

Q. How long have you been working for the Sacramento Navigation Company?

A. Twenty years.

Q. During that time, have you been running up and down the river all the time? A. Yes.

Q. Between Sacramento and San Francisco?

A. Yes.

Q. And also on the upper river?

A. One season up the river, about four months.

Q. What are the duties of a barge pilot?

A. The duty of a barge pilot is to land his tow, and to steer the barge in any danger. [79]

Q. How many barges are steered, that is steered by hand? A. The No. 1 barge.

Q. That is, it steers all the other barges?

A. That controls all of the other barges.

Q. How is the barge steered? A. By a wheel.

Q. Where is the pilot-house located?

A. In the middle of the barge.

Q. On an elevated bridge? A. Yes.

Q. And where are your rudders?

A. On the stern.

Q. How many rudders do you have? A. Four.

Q. What crew did you have on the barge?

A. I had three deck hands, one barge watchman, and a second barge pilot.

(Testimony of G. H. Johnston.)

Q. Did the second barge pilot also steer the barge?

A. Yes, he stands one watch and I stand the other watch.

Q. Six-hour watches? A. Six-hour watches.

Q. Who was on watch at the time that the collision with the "Ravenrock" took place?

Mr. McKEON.—On what barge?

Mr. DORR.—They only stand watch on No. 1 barge.

A. The second barge pilot was on watch, but we were getting ready to make the landing at Port Costa, so I got up to the pilot house just about the time we got down to the "Ravenrock," just before we got down there.

Q. Were in charge of the barge?

A. I took charge of the barge right away.

Q. When did you go into the pilot-house of the "Vermont", that was No. 1 barge, was it not?

A. Yes; about ten minutes before we got down there.

Q. Where were you at that time with respect to the Benicia ferry slip?

A. We were just outside the Benicia ferry slip—before we got down to it. [80—72]

Q. Just above?

A. Just above the Benicia ferry slip.

Q. Had the steamer blown her whistle at that time? A. Blown her whistle to call the crew.

Q. What was the condition as to daylight or darkness?

(Testimony of G. H. Johnston.)

A. It was quite dark when I got out, and hazy, a little; I could not see very good.

Q. How far did you pass from the Benicia ferry slip?

A. About a little over 100 feet, right at the point, right close to the point.

Q. Did you see the light on the "Ravenrock"?

A. Not at that time, not until we got past the ferry slip, it was too dark.

Q. When did you first see the light?

A. Well, we were quite a little distance below the ferry slip before I saw it; and then I did not know what it was; I did not see the ship; I thought it might be a boat going down with her stern lights, first.

Q. Where was the light from the position of your vessel? A. Pretty near direct ahead.

Q. Toward Dillons Point?

A. Yes, toward Dillons Point.

Q. Was it inside of Dillons Point, or outside?

A. It was outside of Dillons Point just a little.

Q. Could you see Dillons Point? A. Yes.

Q. Could you see the hull of any vessel there?

A. At first I could not see the hull, but directly after I saw it, it showed up.

Q. How long after you first saw the light?

A. Two or three minutes, maybe four minutes.

Q. Were you watching the light all the time?

A. I was watching the light, and then I saw the hull of the ship.

Q. How was the ship lying?

(Testimony of G. H. Johnston.)

A. She was lying at an angle from McNears over to Dillons Point, over to Hampton Bay. [81—73]

Q. Was it breaking day at that time?

A. It was just breaking day.

Q. Was it hard to see the ship?

A. It was. The ship was a light color.

Q. How many lights did you see? A. Only one.

Q. Did you look for any others? A. Yes.

Q. Did you ever see any other light?

A. No, I did not see any other light, excepting the one light.

Mr. McKEON.—I renew our objection that I made this morning to this testimony as to the lights on the ground it is not charged.

The COURT.—The objection will be overruled.

Mr. DORR.—Q. After you passed the Benicia ferry, what course did the tug and tow take?

A. Well, they swung in over toward the Benicia side a little and then straightened down. I have got no compass over there.

Q. I mean with respect to the shore; you went to the north side of the channel? A. No.

Q. Over toward the Benicia shore?

Mr. THACHER.—I do not think this is a matter where he should lead the witness at all.

Mr. DORR.—Q. Just state where the tug and tow went?

A. It went over toward the Benicia side, and then straightened right down for the ship.

Q. Then what happened?

A. Then they started to try to pull away from

(Testimony of G. H. Johnston.)

the ship, on the Port Costa side, they were getting pretty well down that way, and the tide started to set it over there.

Q. What did you do?

A. I tried to keep my tow straight.

Q. How did you do that?

A. By steering against the boat.

Q. What do you mean by steering against the boat? [82—74]

A. The boat pulled out the bow of the head barge, and I hauled the bow of the second barge out by the rudder, by steering that way.

Q. What effect did that have?

A. It keeps the tow straight, it keeps them from pulling over all the time.

Q. Would that keep them upstream or downstream?

A. That would hold them up from the "Ravenrock."

Q. How soon after you passed the Benicia ferry slip did you start to turn across the river?

A. We started to pull across the river above the upper end of McNears, up at the ferry slip, practically.

Q. What ferry slip are you referring to?

A. That new ferry slip.

Q. Referring to this chart, Respondent's Exhibit "A" attached to the deposition of Captain Whyte, will you just indicate that ferry slip on this chart, the new ferry slip?

A. Yes, that is where that new ferry slip is.

(Testimony of G. H. Johnston.)

Q. Here?

A. No, this is it. I will put a circle around it. I don't know if that is it, but I think that is it.

Mr. McKEON.—That is where you started to swing across, the place marked with a circle?

A. Yes, we straightened down, to keep away from the ship, that way (illustrating).

Mr. DORR.—Q. Were you holding over toward the Port Costa shore? A. Yes.

Q. How sharp a turn could you make with the tow of four barges?

A. You could not make a very sharp turn, because it would break your towline between the barges; you have got to make a circle, a good, round circle, if you want to make a landing.

Q. Have you made many landings at Port Costa on an ebb tide?

A. Yes, quite often; any time there is an ebb tide when we come down we have got to make a landing there. [83—75]

Q. How much of the channel does it take for the "San Joaquin No. 4" and four barges, loaded as they were at this time, to make that sweep to land at Port Costa?

A. It takes three-quarters of the channel anyhow to make the sweep around.

Q. Did you have any duties in connection with the inspection of the barges? A. Yes.

Q. Will you state whether or not the barges that made up this tow were inspected at the beginning of the voyage?

(Testimony of G. H. Johnston.)

A. Yes, I looked over these barges before we left Sacramento, and they were all in good condition.

Q. In what particulars did you inspect them?

A. To see if there was any water in them, that the rudders were in good condition, and the tillers were working all right.

Q. How about the lines?

A. The lines were all O. K.

Q. Were these barges all in good condition?

A. All in good condition.

Q. Do you know the condition of the barge "Tennessee"? A. First-class condition.

Q. Was she in good condition at the time of the collision? A. Yes.

Q. Seaworthy? A. Seaworthy.

Q. Mr. Johnston, in your work on the river, have you towed behind many pilots?

A. Yes, I have towed behind seven or eight pilots.

Q. Is it difficult work to steer a barge at the head of a long tow?

A. Well, you have to have your rudders and steering gear in good condition to follow a boat.

Q. Is it difficult to handle tows from the steamer in a narrow channel?

A. No, they always follow the steamer.

Q. You always follow the steamer? A. Yes.

Q. From your experience in towboat work, are you able to state [84—76] as to whether or not a pilot, a particular pilot, is a skillful pilot, or not?

A. Yes. You very quickly find that out.

Q. What is your opinion with regard to the pilot

(Testimony of G. H. Johnston.)

that was on the "San Joaquin No. 4" at the time of the collision, in comparison with other pilots that you have known on the river, there?

Mr. McKEON.—I object to that on the ground it is wholly immaterial, irrelevant and incompetent, a matter that the court has to pass upon, and as not a matter that the witness can testify upon.

The COURT.—The objection is overruled.

Mr. McCLANAHAN.—I object on the ground that the witness is not qualified to answer the question.

The COURT.—The objection is overruled.

Mr. DORR.—Q. What is your opinion?

A. My opinion is, I think he is a good, A-No. 1 pilot, understands his business.

Q. Did you ever see a vessel anchored where the "Ravenrock" was anchored that morning?

A. Never in my experience since I have been on the river; that is the first time I saw one anchored in that place.

Q. Where have you seen the vessels anchored in that vicinity, if at all? A. Down below.

Q. Below Dillons Point? A. Yes.

Q. Will you just indicate on this chart, Respondent's Exhibit "A" attached to the deposition of Captain Whyte, where you have seen vessels anchored?

The COURT.—Is there any issue on that point?

Mr. DORR.—Yes, your Honor. That is one of the principal points in issue, that this vessel was anchored in the customary place, and we claim she

(Testimony of G. H. Johnston.)

was anchored in an unusual place and [85—77] obstructed the channel, contrary to the federal statutes. A. There.

Q. Just put a mark on there—where that little anchor is?

A. Yes, seen sailing ships anchored there quite frequently.

Q. I will ask you, Mr. Johnson, after you saw the hull of that vessel, and could make it out, whether or not it was possible to get across to the Port Costa side and avoid that collision?

Mr. McKEON.—If your Honor please, I object to that upon the ground that this witness is not qualified to pass upon it.

The COURT.—It does not seem to me that being a pilot of a barge *per se* would qualify him answer that question, that is, to give any justifiable opinion.

Mr. DORR.—I will bring it out in another way that I think will be competent, if your Honor please.

Q. From that point on, were the tug and tow held as far over toward the Port Costa shore as they were able to hold them?

Mr. McKEON.—From what point?

Mr. DORR.—Q. At the point at which you saw or made out the ship.

Mr. THACHER.—In reference to the course of the vessel, I think that no questions should be put that are leading. I think there is no question about that question being leading, and I do not think that as to the course of a vessel when a barge pilot of this kind is on the stand they should be

(Testimony of G. H. Johnston.)

leading as to the course. And I object to it as leading.

The COURT.—I still do not think that being the pilot of a barge up and down the river would qualify a man to say whether a steamer could hold the tow against the tide, or whether the steamer could cross the space there. I can understand how [86—78] a master of a steamer who is holding it and has held barges in currents and cross-currents would be able to say, but how a man on the barge could say I really cannot see.

Mr. DORR.—That is all.

Cross-examination.

Mr. McKEON.—Q. Mr. Johnston, referring to this Respondent's Exhibit "A" attached to the Whyte deposition, on which you have just placed an anchor down here, do you want us to believe your testimony to be that in 20 years you have seen vessels anchored nowhere in these waters except the place where you have put that anchor?

A. Along here. I do not mean to say only at that one spot. I mean all down below this, here.

Q. Down below Dillons Point?

A. Yes. I never saw one anchored above Dillons Point.

Q. You have never seen a vessel in 20 years anchored above Dillons Point?

A. No, as long as I have been on the river.

Q. How often do you go up and down?

A. Twice a week.

(Testimony of G. H. Johnston.)

Q. Then this anchor, here, does not describe correctly the place where you have seen vessels at anchor? A. In that locality.

Q. How far away from Dillons Point is that?

A. It is quite a ways down below Dillons Point.

The COURT.—Just mark a circle there, within the radius of which you have seen the vessels anchored.

A. Yes, they are always over toward the Benicia side.

Q. As far below Dillons Point as that?

A. Up in here, right in here.

Q. Opposite Carquinez?

A. Yes, across there.

Mr. McCLANAHAN.—Run your circle up there, then. A. That is about it.

Mr. McKEON.—Q. That is about as far as you have seen [87—79] them at anchor? A. Yes.

Q. You have never seen a vessel at anchor at any time above that?

A. Above that, always down below.

The COURT.—How about the upper stretches, up in here?

A. Over here toward Martinez I have seen lots of vessels anchored there, but not lately.

Mr. McKEON.—Q. Draw a pencil mark there.

A. Yes, down to here.

Q. You have seen them in there?

A. A little above that, I think.

Q. Mr. DORR.—Q. That far out in the stream?

(Testimony of G. H. Johnston.)

A. I have seen them pretty well out in the stream, but always out of the fairway of the steamers.

The COURT.—Between the point marked 72 and that point 36 you have never seen any vessels anchored? A. No.

Mr. McKEON.—With the Court's permission, I will mark these circles "anchorage."

The COURT.—Yes.

Mr. McKEON.—Q. Now, Mr. Johnston, this circle that you have drawn—I will mark the place where she turned across here about this point?

A. Yes.

The COURT.—She turned across the bow.

Mr. McKEON.—That is the point opposite that.

The COURT.—That does not indicate the line of the turning?

Mr. McKEON.—No, that is the position opposite that,—the point opposite that marked on the ferry slip where you have put a circle around, and which I have designated where the "San Joaquin" turned across the bow of the "Ravenrock" [88—80] over on the other side, is where she started to cross?

A. Yes.

The COURT.—You had better mark that, to prevent any confusion, with the witness' name underneath, so we will know who is testifying.

Mr. McKEON.—Yes.

Q. Do you know who made up that tow?

A. Cifuentes.

Q. The pilot? A. Yes.

Q. Did you see him make it up?

(Testimony of G. H. Johnston.)

A. I helped to make it up.

Mr. THACHER.—As I understand it, when you rounded the ferry slip at Benicia you then were figuring on getting breakfast?

A. Getting breakfast, getting ready to change pilots there, too.

Q. You were working on that? A. Yes.

Q. And you kept on your course to swing in to the Port Costa dock for a few minutes?

A. The way it looked to me the pilot was trying to keep clear of that ship.

Q. That was later on?

A. That was after we passed the ferry slip.

Q. But that was when you got opposite the point you have marked on this chart? A. Yes.

Q. That is the first time that you noticed he was taking a different course than the usual course: Is that right? A. That is right.

TESTIMONY OF W. P. DWYER, FOR RESPONDENT.

W. P. DWYER, called for the Sacramento Navigation Company, sworn.

Mr. DORR.—Q. What is your occupation, Mr. Dwyer?

A. I am president of the Sacramento Navigation Company.

Q. The operators of the "San Joaquin No. 4" and the "Tennessee"? A. Yes.

Q. Where is your office, Mr. Dwyer?

(Testimony of W. P. Dwyer.)

A. San Francisco. [89—81]

Q. Are you actively engaged in the business?

A. Yes.

Q. Do you personally have knowledge of the condition of your vessels and barges? A. Yes.

Q. Can you state as to the condition of the "San Joaquin No. 4" at the time of this collision, on October 1, 1921, as to seaworthiness?

A. I can. It was in A–No. 1 condition, perfectly seaworthy.

Q. In every respect? A. In every respect.

Q. How about the "Tennessee"?

A. The "Tennessee" was in a perfectly seaworthy condition.

Mr. McKEON.—I would like to make an objection to this upon the ground that the witness is not qualified or shown to be qualified.

Mr. DORR.—He said he had personal knowledge of the condition of his own boats.

Mr. McKEON.—Personal knowledge of conditions and qualifications to pass upon them are different things.

Mr. DORR.—I will ask him a question to qualify him: Have you had any experience in the superintendence of the building of boats and rebuilding?

A. Yes.

Q. Over a period of how many years?

A. I have been working for this company since 1893, during which time I have been in charge of the construction and reconstruction of vessels in San Francisco, and up until about five years ago,

(Testimony of W. P. Dwyer.)

when I went to Sacramento and assumed general charge of the business, since which time I have also had actual charge of the construction and reconstruction of vessels in our own yards.

Q. Now, what would you say as to the condition of the "Tennessee"?

A. The "Tennessee" was in A-1 condition. As a matter of fact, the "Tennessee" had been completely rebuilt two years before this accident, and was probably the best barge that [90—82] we had at that time.

Q. Was she badly damaged by this collision?

A. She was; she was broken in two; the bow of the steamer rammed practically half way through the barge.

Mr. McKEON.—Q. Did you see the collision?

A. No.

Mr. McKEON.—I move to strike the answer out.

The COURT.—Q. Did you see the result of it?

A. Yes, your Honor.

The COURT.—Let the answer stand, unless it is claimed that the injury was done by something else.

Mr. McKEON.—I don't know. There was maneuvering around of that barge for some time. I think that is a question that goes to damages, and we are not going into the damages now, as I understand.

Mr. DORR.—I just wanted to show she was damaged. I have two shipping receipts which it is consented by Mr. McKeon may be introduced without

(Testimony of W. P. Dwyer.)

objection, covering the shipments of barley on the barge "Tennessee." I will offer these in evidence.

Q. Mr. Dwyer, did you have any other contract with the shippers of any of the cargo on the "Tennessee" other than these shipping receipts?

A. No.

Q. That is, as to the Salz cargo?

A. No contract, except that covered by that ordinary bill of lading.

Q. Was there any cargo on the "Tennessee" besides the Salz cargo? A. I believe there was.

Q. There was some Sacramento transportation cargo?

A. Yes, there was also some other cargo.

Q. Also sacks of barley? A. Yes.

Q. Mr. Dwyer, did you have anything to do with the hiring of [91] the captains and pilots on your vessels? A. Yes.

Q. What did you have to do with it?

A. I hire all of the captains and pilots of our company.

Q. Have you any special system of training your captains and pilots? A. Yes.

Q. Will you just state what it is to the Court.

A. The towboat business of this company is in a way divided into two parts; north of the city of Sacramento the river is narrow and crooked, very shallow in the summertime. The river is very difficult to navigate. The channel at times is scarcely wider than a barge. The shallow water conditions make it extremely hazardous, and a man

(Testimony of W. P. Dwyer.)

who has navigated on the upper river towing barges becomes an expert such as few men engaged in piloting ever become. We train the men for the "San Joaquin No. 4," and always have trained them, on the upper first, and when they have become expert on the upper river we then put them on the lower river, and after they have learned the channel and the tides and conditions there, we put them on the "San Joaquin No. 4."

Q. Was the pilot Cifuentes, who was on the "San Joaquin No. 4" at the time of the collision trained on the upper river? A. He was.

Q. Under your direction? A. Yes.

Q. From your experience in training pilots for that work, are you able to form an opinion as to whether a pilot is skillful or not? A. Yes.

Mr. McKEON.—I object to that on the ground the witness is not qualified to pass upon the question.

The COURT.—The objection will be overruled.

Mr. McKEON.—There is no showing here that this man [92] ever piloted a tug.

The COURT.—I do not understand that a man has to be a pilot to say whether another pilots well or not. He can observe him pilot if he sees him often enough. That would be the common-sense view of it. A. Yes.

Mr. DORR.—Q. What is your opinion as to the skill of the pilot Cifuentes?

Mr. McKEON.—I will renew my objection to that.

(Testimony of W. P. Dwyer.)

The COURT.—The objection will be overruled.

A. I consider him a very skillful pilot; he comes of a family of pilots; his father has been a pilot before him, and worked for our company for 40 years. I might explain that by saying that pilots are born, you cannot make them; and in our experience, we take a great many young fellows and try them out, and we weed those out that do not make pilots; it does not take very long before we find out whether he will make a pilot, or not. Cifuentes was one that picked this business up readily, it came to him naturally. I, personally, selected him from the upper river, and put him on the "San Joaquin No. 4" myself, by reason of his skill.

Mr. DORR.—That is all.

Cross-examination.

Mr. McKEON.—Q. How many stern wheelers have you that you use as tows? A. Six.

Q. The "San Joaquin" is the largest? A. Yes.

Mr. THACHER.—Q. What is the horsepower of the "San Joaquin"? A. About 500.

Mr. DORR.—I wish to offer in evidence, if your Honor please, without reading it, the deposition of Captain Thomas [93] Schartzer, on behalf of the libelant, Sacramento Navigation Company. In regard to the deposition of Captain Whyte, which Mr. McClanahan said he did not care to offer, I will also offer that in evidence. It is somewhat cumulative of the other depositions,

but I want it in for the purpose of calling attention to a particular point, and I think there are some discrepancies in the testimony.

The COURT.—Very well.

Mr. DORR.—That is the deposition of Captain White in the case of Salz vs. Sacramento Navigation Company.

Mr. McKEON.—That deposition was taken prior to the institution of that suit, and we were not represented or present at the taking of the deposition, and, of course, it is in no sense admissible against us.

Mr. THACHER.—The same applies to us.

The COURT.—Allright.

Mr. DORR.—That is the libelant's case.

Mr. McKEON.—On behalf of the "Ravenrock," we would like to offer in evidence the depositions of Albert John Whyte, Sydney Taberham Chapman, John Evans, and John Walker, all taken on behalf of the "Ravenrock" in the suit of Sacramento Navigation Company vs. the British steamship "Ravenrock," and also the exhibits that were introduced upon the taking of those depositions, and ask that they be considered read at this time. [94]

(EXTRACT FROM PAGE 106 OF THE TESTIMONY.)

The COURT.—Now, Mr. McClanahan, suppose you present your case. You say you can do it in five minutes.

Mr. McCLANAHAN.—I first offer in evidence the depositions of Albert John Whyte, Sydney

Taberham Chapman, John Evans and John Walker, already introduced in case No. 17354.

I offer in evidence the following letter, which I wish to read:

"June 5, 1922.

Messrs. McClanahan & Derby,
Merchants Exhange Building,
San Francisco.

Dear Sirs:

"Re Salz v. Sacramento Navigation Company:

"We have been authorized by our clients to stipulate with you in the above action that the barley was in good order and condition when received for shipment. You may, therefore, consider this letter as a stipulation as to that fact. We also wrote to our clients for certain information regarding the ownership of the barley, but have not heard from them on this point."

Since then, I have understood that we have a stipulation that the libelant in this action was the owner of the barley: Is that correct?

Mr. DORR.—Yes.

Mr. McCLANAHAN.—This will be Salz Exhibit "A." You have introduced the shipping receipts, haven't you?

Mr. DORR.—I have.

Mr. McCLANAHAN.—I think that is all. [95]

In the Southern Division of the United States District Court, for the Northern District of California, In Admiralty, Third Division.

No. 17,354—No. 17,359. (Consolidated Cases.)

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

British Steamship "RAVENROCK," etc.,

Respondent,

A. J. WHYTE, Master of the British Steamship "RAVENROCK,"

Cross-libelant;

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Cross-respondent,

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY, a Corporation,

Third Party.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

OPINION.

ANDROS & HENGSTLER and F. W. DORR, Esq., Proctors for Sacramento Navigation Co.

FARNHAM P. GRIFFITHS, Esq., and McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE, Proctors for British Steamer "Ravenrock." [96]

THACHER & WRIGHT, Proctors for Shipowners and Merchants Tugboat Co.

McCLANAHAN & DERBY, Proctors for Milton H. Salz.

The Court from all the evidence finds the following to be the facts:

1. The "Ravenrock" was not so anchored in a navigable channel as to prevent or obstruct the passage of other vessels or craft nor was it anchored in an improper or unusual place.

2. The "San Joaquin No. 4" was at fault in not having a lookout at and prior to the time of the collision, who might have discovered the second light on the "Ravenrock." The pilot in charge of the "San Joaquin No. 4" was also at fault in assuming until too late that the light which he did see on the "Ravenrock" was the stern light of a receding tow.

3. The grain that was lost belonging to Milton H. Salz was carried by the barge "Tennessee" under a bill of lading issued for it only and not for the towing steamer, and though the towing steamer and the barge belonged to the same owner, the Harter Act does not apply.

4. Milton H. Salz is entitled to a decree against the Sacramento Navigation Company for the amount of its loss.

5. The master of the "Ravenrock" is also entitled to a decree against the said company for the damage resulting from the collision.

6. The Shipowners and Merchants Tugboat Company is entitled to be dismissed.

A decree will be entered accordingly.

November 6th, 1923.

M. T. DOOLING,
Judge. [97]

[Endorsed]: Filed Nov. 6, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [98]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

STIPULATION AS TO LIBELANT'S DAMAGES.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, acting through their proctors thereunto duly authorized, that the damages of Milton H. Salz, doing business as E. Salz & Son, sustained for the loss of and damage to his cargo of barley (referred to in the libel herein), amounted (exclusive of interest and costs) to the sum of Ten Thousand Two Hundred Forty and 51/100 Dollars ($10,240.51), the reference to the Commissioner under the interlocutory decree herein being hereby waived. This stipulation shall not be deemed an admission by said respondent of liability for said damage or any part thereof; the right of said respondent to contest its alleged liability for said damage or any part thereof being hereby expressly reserved.

Dated: February 6, 1924.

McCLANAHAN & DERBY,
CARROLL SINGLE,
Proctors for Libelant.
ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent. [99]

[Endorsed]: Filed Feb. 11, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [100]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

FINAL DECREE.

WHEREAS, by interlocutory decree herein lodged on November 8th, 1923, and signed and entered on November 16th, 1923, it was duly ordered, adjudged and decreed that libelant, Milton H. Salz, recover from respondent the damages sustained for the loss of and damage to his cargo of barley (referred to in the libel herein) together with interest and costs; and that the cause be referred to Francis Krull, United States Commissioner, to ascertain and compute the amount of such damages; and,

WHEREAS, without prejudice to respondent's right to contest its liability for said or any damages, the parties herein have stipulated and agreed that the amount of such damages is the sum of Ten Thousand Two Hundred Forty and 51/100 ($10,-

240.51) Dollars, rendering unnecessary any hearing by said Commissioner;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that libelant, Milton H. Salz, doing business as E. Salz & Son, do have and recover from respondent, Sacramento Navigation Company, a corporation, the said sum of Ten Thousand Two Hundred Forty and 51/100 ($10,240.51) Dollars damages, together with interest thereon at and after the rate of seven per centum [101] (7%) per annum from October 1st, 1921, to date, which said interest amounts to the sum of One Thousand Seven Hundred Twenty-four and 32/100 Dollars ($1724.32), making a total of Eleven Thousand Nine Hundred Sixty-four and 83/100 Dollars ($11,964.83) and that respondent, Sacramento Navigation Company, a corporation, pay to libelant the said total sum of Eleven Thousand Nine Hundred Sixty-four and 83/100 Dollars ($11,964.83), together with interest thereon at and after the rate of seven per centum (7%) per annum from the date of this decree, until the same is satisfied, together with libelant's costs to be taxed herein.

Dated: San Francisco, Feb. 26, 1924.

BOURQUIN,
Judge.

Approved as to form:

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent.

[Endorsed]: Entered in Vol. 15, Judg. and Decrees, at page 426. Filed Feb. 26, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [102]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

NOTICE OF APPEAL.

To Milton H. Salz, doing business as E. Salz & Son, Libelant, and to Messrs. McClanahan & Derby, his proctors, and to the Clerk of the United States District Court for the Northern District of California:

You and each of you will please take notice that the Sacramento Navigation Company, a corporation, respondent in the above-entitled cause, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit from that certain final decree made and entered in the above-entitled cause on the 26th day of February, 1924.

Dated: San Francisco, California, April 23, 1924.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent. [103]

Due service and receipt of a copy of the within notice of appeal is hereby admitted this 23d day of April, 1924.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Apr. 24, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [104]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

ASSIGNMENT OF ERRORS.

The respondent above named hereby assigns errors in the proceedings in the District Court, as follows:

I.

The court erred in holding that the bill of lading covering the grain belonging to Milton H. Salz was issued for the barge "Tennessee" only, and not for the towing steamer.

II.

The court erred in holding that although the towing steamer and the barge belonged to the same owner, the Harter Act did not apply.

III.

The court erred in not holding that under the facts of the case, the Harter Act did apply.

IV.

The court erred in not holding that, if the contract between the libelant and respondent was not a contract of affreightment, but a contract of towage, as claimed by the libelant, then respondent was not liable for the loss and damage to libelant's barley, under the terms of said contract of [105] towage.

V.

The court erred in not holding that respondent was not liable for the loss and damage to libelant's barley.

VI.

The court erred in holding that libelant, Milton H. Salz, was entitled to a decree for the amount of his loss against the respondent, Sacramento Navigation Company.

VII.

The court erred in ordering, adjudging and decreeing that libelant should recover from respondent

the sum of $10,240.51, damages, or any other sum whatever.

VIII.

The court erred in ordering, adjudging and decreeing that libelant should recover from respondent the interest in said final decree set forth, or any other interest whatever.

IX.

The court erred in ordering, adjudging and decreeing that libelant should recover from respondent his costs incurred in said action.

X.

The court erred in that it did not make a final decree dismissing said libel, with costs to respondent.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent. [106]

Due service and receipt of a copy of the within assignment of errors is hereby admitted this 14th day of May, 1924.

McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed May 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [107]

In the Southern Division of the United States District Court for the Northern District of California, Third Division.

IN ADMIRALTY—No. 17,359.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Libelant,

vs.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Respondent.

STIPULATION RE RECORD ON APPEAL.

IT IS HEREBY STIPULATED that all of the testimony, taken at the trial of the above-entitled cause, and the depositions offered in evidence, may be omitted from the record on appeal, except the following:

Opening statement, pages 1, 2 and 3 of transcript;
Testimony of Bernard J. Dolan;
Testimony of Marshall Cifuentes;
Testimony of G. H. Johnston;
Testimony of W. P. Dwyer;
Transcript, page 106, beginning at line 2 and ending with line 25;
Exhibit, Libelant's No. 1, Inspection certificate;
Exhibit, Libelant's No. 4, _____ (Shipping receipts).

IT IS FURTHER STIPULATED, however, in view of the above omissions from the record, that,

for the purposes [108] of this appeal, it may be taken as a fact that the loss of libelant's cargo of barley shipped on the barge "Tennessee" was caused by the negligence of those in charge of the navigation of the respondent's vessel, "San Joaquin No. 4."

IT IS FURTHER STIPULATED that the originals of the foregoing exhibits, namely, Libelant's Exhibit No. 1, Inspection Certificate, and Libelant's Exhibit No. 4, Shipping Receipts, may be filed in the Circuit Court of Appeals, and that copies of said exhibits may be omitted from the record on appeal.

Dated: San Francisco, California, August 8, 1924.

ANDROS & HENGSTLER,
F. W. DORR,
Proctors for Respondent.
McCLANAHAN & DERBY,
Proctors for Libelant.

[Endorsed]: Filed Aug. 8, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [109]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 109 pages, numbered from 1 to 109, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Milton H. Salz, etc.,

vs. Sacramento Navigation Co., a corp., No. 17359, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe for apostles on appeal (copy of which is embodied herein) and the instructions of the proctors for appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Forty-three Dollars and Fifteen Cents ($43.15) and that the same has been paid to me by the proctors for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of August, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [110]

[Endorsed]: No. 4321. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed August 27, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN ADMIRALTY.—No. ——.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING JUNE 22, 1924, TO FILE RECORD AND DOCKET CAUSE.

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 22d day of June, 1924, within which to file the record and docket the above-entitled cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 22, 1924.

ANDROS & HENGSTLER,
Proctors for Appellant.
McCLANAHAN & DERBY,
Proctors for Appellee.

It is so ordered.

HUNT,
United States Circuit Judge.

[Endorsed]: No. 4321. Dept. No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. In Admiralty. Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellee. Stipulation. Filed May 22, 1924. F. D. Monckton, Clerk. Refiled Aug. 27, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

IN ADMIRALTY.—No. ——.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING JULY 22, 1924, TO FILE RECORD AND DOCKET CAUSE.

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 22d day of July, 1924, within which to file the record and docket the above-entitled cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 22, 1924.

ANDROS & HENGSTLER,
Proctors for Appellant.
McCLANAHAN & DERBY,
CARROLL SINGLE,
Proctors for Appellee.

It is so ordered.

HUNT,
United States Circuit Judge.

[Endorsed]: No. 4321. In the United States Circuit Court of Appeals, in and for the Ninth Circuit. In Admiralty. Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellee. Stipulation. Filed Jul. 22, 1924. F. D. Monckton, Clerk. Refiled Aug. 27, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

IN ADMIRALTY.—No. ——.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING AUGUST 22, 1924, TO FILE RECORD AND DOCKET CAUSE.

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 22d day of August, 1924, within which to file the record and docket the above-entitled cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: July 21, 1924.

ANDROS & HENGSTLER,
Proctors for Appellant.
McCLANAHAN & DERBY,
Proctors for Appellee.

It is so ordered.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 4321. In the United States Circiut Court of Appeals, in and for the Ninth Circuit. In Admiralty. Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellee. Stipulation. Filed Jul. 22, 1924. F. D. Monckton, Clerk. Refiled Aug. 27, 1924. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

IN ADMIRALTY.—No. ——.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 5, 1924, TO FILE RECORD AND DOCKET CAUSE.

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 5th day of September, 1924, within which to file the record and docket the above-entitled cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: August 21, 1924.

ANDROS & HENGSTLER,
Proctors for Appellant.

McCLANAHAN & DERBY,
Proctors for Appellee.

It is so ordered:

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 4321. In the United States Circuit Court of Appeals in and for the Ninth Circuit, in Admiralty. Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellee. Stipulation. Filed Aug. 21, 1924. F. D. Monckton, Clerk. Refiled Aug. 27, 1924. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed October 1, 1924. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 4321

United States
Circuit Court of Appeals
For the Ninth Circuit.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellees.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Third Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1924, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twentieth day of November, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4321.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

ORDER OF SUBMISSION.

ORDERED appeal in above-entitled cause argued by Mr. Louis T. Hengstler, proctor for appellant, and by Mr. S. Hasket Derby, proctor for the appellee, and submitted to the Court for consideration and decision, with leave to proctor for the appellant to file a reply brief within thirty (30) days from date, and with leave to proctor for the appellee to

reply thereto within twenty (20) days thereafter, if so advised.

At a stated term, to wit, the October Term, A. D. 1924, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-sixth day of January, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES.

By direction of the Honorable William B. Gilbert, William H. Hunt and Frank H. Rudkin, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a decree be filed, and recorded in the minutes of this court, in each of the causes in accordance with the opinion filed therein: * * * Sacramento Navigation Company, a Corporation, Appellant, vs. Milton H. Salz, Doing Business as E. Salz & Son, Appellee. No. 4321. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 4321.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before GILBERT, HUNT and RUDKIN Circuit Judges.

The appellee brought an action *in personam* against the appellant, the owner of the steamer "San Joa*chin* No. 4," to recover for negligent towage of a cargo of barley shipped on board the appellant's barge "Tennessee" at landings on the Sacramento River for transportation to Port Costa. Shipping receipts were issued which recited that the barley was shipped "on board of the Sacramento Transportation Co.'s Barge 'Tennessee'" to be delivered at Port Costa, "dangers of fire and navigation or any other peril, accident, or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted; with the privilege of reshipping in whole or in part, on

steamboats or barges; also with the privilege of towing with one steamer, at the same time, between Sacramento and San Francisco, down or up, two or more barges, either loaded or empty." The "San Joaquin No. 4" picked up the "Tennessee" and three other barges and on the way to Port Costa came into collision with the British steamer "Ravenrock," whereby the barge sank and the appellee's cargo was lost. The appellant, in its answer, alleged that the "San Joaquin No. 4" was at all times in all respects seaworthy, properly manned, equipped and supplied, and that the barge was, while carrying said barley on said voyage, operated by appellant together with said steamer as a single carrier of goods and merchandise for hire, and that there was no contract of towage between the steamer and the barge, or between the appellant and the appellee, and pleaded exemption of liability under the Harter Act. On the trial the negligence of the "San Joa*chin* No. 4" was established and it is not disputed on the appeal. The Court below made a finding that the cargo so lost was carried by the "Tennessee" under a bill of lading issued for it only and not for the towing steamer, and that although the towing steamer and the barge belonged to the same owner, the Harter Act did not apply, and held that the appellant was answerable for the loss of the cargo.

GILBERT, Circuit Judge, after stating the case:

The appellant contends that the cargo having been loaded on a barge which became an instrument in

the transportation of the cargo only in connection with the tug, the situation was the same as if it had been carried on the tug, and that the relation between the appellee and the appellant was solely one of affreightment. But there was no contract here between the appellee and the barge and the tug. The bill of lading was made with the barge and did not include the tug, and there is nothing therein to indicate that the tug and the tow were engaged in a common venture. Since the barge had no power of her own there was an implied contract that a tug would be furnished by the appellant to carry her to her destination. The only express reference to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage, a reservation evidently made to obviate objection to possible delay in transportation caused by the additional load.

We do not regard the situation the same as it would be had the cargo been carried upon the tug itself. The Supreme Court in considering the provisions of the Harter Act in their relation to the evils which it was intended to obviate has tended toward a strict construction thereof. "The Irawaddy," 171 U. S. 195, 196; "The Delaware," 161 U. S. 459. In "The Irawaddy" it was said: "Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing and to limit the relief from their operation afforded by the statute to that called for by the language itself of the

statute." In "The Delaware" the Court said: "It is entirely clear that the whole object of the act is to modify *the relations previously existing* between a vessel and her cargo." The appellant relies upon the decisions of this court in "The Columbia," 73 Fed. 226, and "The Seven Bells," 241 Fed. 43. The first of those cases was decided before the enactment of the Harter Act and the Court had under consideration therein the limited liability statute, Rev. Stats. 4282–4290. It was held that where the owner of a barge undertook to transport cargo by means thereof and by its own tug, the two vessels became one for the purpose of the voyage, and that the owner was not entitled to limit his liability for damages caused by the negligence of the crew of either without surrendering both. We applied in that case the same rule of strict construction which has been indicated by the Supreme Court in construing the Harter Act. The purport of the decision was that the Carrier could not obtain the benefit of the limited liability statute without surrendering the whole means by which it undertook to transport the cargo, thus applying the principle that where two or more vessels belonging to the same person are engaged in a transportation service under a common direction all are equally answerable for the negligence of the common head, 24 R. C. L. 1398, and the language of the Court in "The Main" vs. Williams, 152 U. S. 122, 131, 132, where it was said: "The real object of the act in question was to limit the liability of vessel owners to their interest in the adventure * * * The English courts have

held very properly, we think, that these statutes should be strictly construed." In "The Seven Bells" the owner of a barge made a contract with the owner of a tug by which the latter was to make daily trips with the barge and to haul all freight and express which the owner might furnish. It was held on the evidence that the tug was insufficient in power to handle properly the barge in rough weather, that both vessels were liable for loss of the cargo on the barge when she was cast off by the launch during a high wind, and that the libellant's contract with the owner of the barge whereby he shipped goods thereon, was not merely one of towage, but for carriage, on which the two vessels became one instrumentality, the owner of the barge being the owner of the launch *pro hac vice*. It is true that in that case the Harter Act was set up as a defense, but it was not involved in the decision, as the owner of the cargo recovered judgment for his damages on the ground that the tug was insufficiently equipped to handle the barge.

We are of the opinion that the Harter Act applies only to the relation of a vessel to the cargo with which she is herself laden and does not relieve the owner of a tug from liability for its negligence in towing the barge on which the cargo is carried. Cases directly in point are "The Murrell," 200 Fed. 826, aff. in Baltimore & Boston Barge Co. vs. Eastern Coal Co., 195 Fed. 483; "The Coastwise," 230 Fed. 504, aff. 233 Fed. 1. In affirming the decision in the case of "The Murrell," the Circuit Court of Appeals said: "Clearly on its face the Harter Act

had in mind not so much a broad principle as only the relations which exist between a vessel and the cargo with which she is herself laden." The appellant cites "The Nettie Quill," 124 Fed. 664. In that case the owner of a steamboat carrying freight and passengers for hire as a common carrier, contracted to carry a certain steam locomotive, the owner thereof to furnish a barge. The bill of lading stated that the locomotive was shipped on board "The Steamboat 'Nettie Quill' and Barges." The Court held that the agreement was a contract of affreightment and not one of towage, notwithstanding that the locomotive was carried on the barge alongside the steamer, and that under the Harter Act, the steamer was not liable for loss or injury occasioned by the collision of the barge with an obstruction in the river. In holding that the contract was one of affreightment the Court said: "A contract of affreightment is a contract with a ship owner to hire his ship or part of it for the carriage of goods or other property." We may point to that expression of the Court as the distinguishing feature of the decision. It serves also to distinguish that case from the case at bar, for here there was no contract with the tug, and there was no hiring of the tug for carriage of the cargo.

We find no merit in the contention that irrespective of the Harter Act the appellant is exempted from liability by the terms of the bills of lading. The bills of lading were issued for goods on board the barge "Tennessee." The exceptions therein expressed extend only to dangers of fire and naviga-

tion or any other peril, accident, or danger of the seas, rivers, or steam navigation, or steam machinery, and they apply only to the barge and not to the tug or to any other vessel, or to the appellant as the owner of the tug. No tug was referred to in connection with the contract of transportation. The exemption clause therefore does not excuse negligent towage. The Steamer "Syracuse," 12 Wall. 167; Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. 397; Alaska Commercial Co. vs. Williams, 128 Fed. 362; Mylroie vs. British Columbia Mills Tug & Barge Co., 268 Fed. 449. The appellant cites "The Oceanica," 170 Fed. 893; "The Maine," 161 Fed. 401, reversed 170 Fed. 917; and the "G. R. Crowe," 287 Fed. 426, aff. 294 Fed. 506. In "The Oceanica" it was held that a contract of towage by which the tow assumes all risks releases the tug from her own negligence, resulting in injury to the tow. In that case the owner of the tug contracted with the owner of the barge that the tug should tow the barge from Marquette to Buffalo, "the tow to assume all risks." The Court, while accepting the rule that a contract will not be construed to cover the Carrier's negligence unless the intention to do so is expressly stated, held, one Judge dissenting, that a tug, being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. On rehearing the Court said: "We do appreciate keenly that the decision of the majority of the Court as to the right of a tug to contract against her own negligence

is a departure from previous decisions." We think that it is a departure from the principles announced in the decisions of the Supreme Court which we have cited. It may be said, by way of distinguishing the present case from that of "The Oceanica," that in the latter the contract was made between the owner of the tug and the owner of the barge, and that the Court found in the terms thereof an intention of the contracting parties to absolve the tug from the consequences of its own negligence, whereas, in the case at bar, the contract is wholly between a shipper of cargo and the owner of the barge on which it was to be carried. The decision of the case of "The Maine" was based upon the fact that the lighterage company which furnished the barge and the tug was not a common carrier, but as a private carrier undertook the service under a contract which provided that the shipper should have no claim upon it, or its equipment, or boats which it might charter or control, for any loss of cargo. In "The G. P. Crowe" it was held that a vessel chartered for full cargo was not a common carrier, but a bailee for transportation and could, by the express provisions of the charter-party, be exempted from liability for leakage. We do not see that either decision casts material light upon the question involved in the present case.

The decree is affirmed.

[Endorsed]: Opinion. Filed Jan. 26, 1925. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4321.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Third Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, Third Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Jan. 26, 1925. Frank D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1924, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-fourth day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ERSKINE M. ROSS, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable FRANK H. RUDKIN, Circuit Judge.

No. 4321.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

ORDER STAYING MANDATE.

On motion of Mr. Frederick W. Dorr, proctor for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance of the mandate

of this Court under Rule 32 in the above-entitled cause be, and hereby is stayed for thirty (30) days from and after February 26, 1925, until the petition to be made on behalf of the appellant to the Supreme Court of the United States for the issuance of a writ of certiorari herein be disposed of, on condition that the said petition be docketed in the said Supreme Court within thirty (30) days from and after this date.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 4321.

SACRAMENTO NAVIGATION COMPANY, a Corporation,

Appellant,

vs.

MILTON H. SALZ, Doing Business as E. SALZ & SON,

Appellee.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO RECORD CERTIFIED UNDER SECTION 3 OF RULE 37 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty-nine (149) pages, numbered from and including 1 to and including 149, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of March, A. D. 1925.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1925

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7100)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY (a corporation),
Petitioner,

vs.

MILTON H. SALZ, doing business as E. Salz & Son,
Respondent.

BRIEF FOR PETITIONER.

H. H. SANBORN,
Balfour Building, San Francisco,
LOUIS T. HENGSTLER,
FREDERICK W. DORR,
Kohl Building, San Francisco,
Proctors for Petitioner.

ANDROS, HENGSTLER & DORR,
Kohl Building, San Francisco,
Of Counsel.

Subject Index

Table of Authorities Cited

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 330

SACRAMENTO NAVIGATION COMPANY (a corporation),
Petitioner,

vs.

MILTON H. SALZ, doing business as E. Salz & Son,
Respondent.

BRIEF FOR PETITIONER.

INTRODUCTORY STATEMENT.

This is a cause in admiralty and involves the construction and scope of the Harter Act, (Act of Cong. Feb. 13, 1893, ch. 105; 27 Stat. 445).

The relevant portion of the Act involved is the following:

> "Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her

owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The opinion of the District Court is found on page 117 of the Transcript of Record. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 3 Fed. (2d) 759, and may also be found at page 139 of the transcript.

A writ of certiorari was granted by the Supreme Court on the 20th day of April, 1925.

I. STATEMENT OF THE CASE.

A. THE FACTS.

This is a libel *in personam* in admiralty brought by the respondent against the petitioner for damages sustained by the respondent as the owner of a shipment of barley carried by petitioner from a point on the Sacramento River, State of California, to a lower point on the same river. Petitioner is a common carrier of merchandise on said river.

The libel, in substance, alleges the following facts (Trans. p. 5-7):

That respondent herein was the owner of 9853 sacks of barley shipped and on board the barge "Tennessee"; that petitioner is engaged in the transportation of merchandise on the Sacramento River, and is the owner of the steamer "San Joaquin No. 4" and the said barge "Tennessee"; that respondent "shipped and turned over to" petitioner herein, and petitioner

received the said barley, which was loaded on the barge "Tennessee", "and under tow of the said stern wheel steamer 'San Joaquin' was being transported" from points on the river to Port Costa on the outlet of the river with San Pablo Bay; that while the barge with the barley on board was being towed by the steamer on October 1, 1921, the steamer negligently permitted the barge to come into collision with a British steamship at anchor; that as a result of the negligent collision the barge was swamped and the barley became a total loss; that the collision was caused *solely* by the negligent handling of the barge by the steamer.

(It should be particularly noted that the libel was promoted against petitioner *in personam* as owner of the barge and the negligent steamer.) (Libel II, Trans. p. 6.)

When the merchandise was turned over to petitioner, a bill of lading was issued by petitioner and received by respondent, of which the following is a copy:

> "Original receipt. Celli's Ldg., Sept. 23, 1921. Shipped by J. F. Bedwell, on board of the Sacramento Transportation Co's. Barge 'Tennessee' the following packages, contents unknown, to be delivered at Port Costa Dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted; with the privilege of re-shipping in whole or in part, on steamboats or barges; also with the privilege of towing with one steamer, at the same time, between Sacramento and San Francisco, down or up, two or more barges, either loaded or empty.

Marked: Strauss & Co. Notify E. Salz & Sons.

No. of Pkgs.	Articles	Weight Subject to Correction
2919	bags of Barley	Lot 1
1642	"	" Lot 2

Received subject to all of the conditions and agreements contained in and endorsed hereon.

E. J. LEAVITT, Agent.

Accepted:

E. Salz & Sons, Shipper.
By J. W. Moynihan, Agent."

(Original exhibit on file in Supreme Court.)

For the purpose of this case the facts alleged in the libel, as above stated, may be deemed to be proved, including the negligence of the towing steamer, "San Joaquin No. 4", and the fact that said negligence was the sole cause of the loss of the barley, the barge having no motive power.

The uncontradicted evidence shows that both the barge and the towing steamer were in all respects seaworthy and properly manned, equipped and supplied.

Testimony of Captain Dolan. (Trans. pp. 27, 28);

Testimony of W. P. Dwyer. (Trans. pp. 108-113, inc.);

Testimony of G. H. Johnston. (Trans. pp. 101-103, inc.)

B. THE QUESTIONS.

1. The Principal Question Involved is Whether, Under the Circumstances, Petitioner is Exempt From Liability by Virtue of the Provisions of Section 3 of the Harter Act.

Petitioner's contention is that, the loss having resulted from faults or errors in navigation or in the

management of the vessel which was transporting the merchandise under a contract of affreightment, and the said vessel having been in all respects seaworthy and properly manned, equipped and supplied, the owner is not to be held responsible for the loss under section 3 of the Harter Act.

This involves the basic contention that, under the Harter Act, the "vessel transporting the merchandise", in connection with the customary river transportation as illustrated by the facts of the instant case, is not the barge alone, but *the combination of steamer and barge.* Respondent's contention in this behalf is, that the barge alone is the "vessel transporting the merchandise."

There is a second question injected into the case by respondent's contention that the case is one of towage, and is: May the owner of a towboat contract against liability caused to the tow or its cargo by the negligence of the navigator of the tug?

Neither of these questions have ever been decided by the Supreme Court.

II. ARGUMENT.

A. THE EXEMPTION OF SECTION THREE OF THE HARTER ACT APPLIES TO RIVER TRANSPORTATION.

> "Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects * * * and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."
>
> *The Irrawaddy,* 171 U. S. 187, 192.

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>
> *The Irrawaddy,* 171 U. S. 187, 192.

By its language the Act applies to "any vessel transporting merchandise or property to or from any port in the United States."

> "This language cannot be construed otherwise than as meaning that the section shall apply to *all vessels transporting merchandise to and from any port of the United States, situated upon any navigable waters, inland or otherwise,* over which the federal government has jurisdiction."
>
> *In re Piper Aden Goodall Co.,* 86 Fed. 670, 671.

The Act applies, therefore, to river transportation such as is illustrated by the facts of the instant case, and to the "vessels transporting merchandise" on such rivers.

B. THE INSTANT CASE IS BASED UPON A CONTRACT OF AFFREIGHTMENT, NOT A TOWAGE CONTRACT.

Except for the fact that, in the lower courts, respondent has strenuously taken the position that the contract shown in this case is a towage, and not an affreightment contract, we would omit argument on this question which, we believe, the reading of the bill of lading cannot leave in doubt.

The libel prays for damages suffered by the shipper of the barley which became a total loss as the result of negligent navigation. The District Court held that "the grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' *under a bill of lading.*" (Trans. p. 117.)

The Circuit Court of Appeals held that "the bill of lading was made with the barge and did not include

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*(Italics in quotations ours.)

the tug * * * there was an implied contract that a *tug would* be furnished by the apellant to carry her to her destination." (Trans. p. 141.) Again the court said:

"There was no hiring of the tug for carriage of the cargo." (Trans. p. 144.)

It would seem to us that a finding that there was an implied contract that a tug would be furnished to carry the barge with the cargo on her to her destination (meaning obviously to the destination of the cargo), leads inevitably to the conclusion that the bill of lading contract was not made with the barge alone.

An inspection of the bill of lading shows that it was a contract made with the petitioner, a transportation company, and not with the barge. It was signed by the agent for the transportation company and by the agent for the shipper. The libel was brought against the petitioner *in personam,* who is described therein as being "engaged in the transportation of merchandise on the Sacramento River." (Trans. p. 6.) The libel alleges that "libelant had shipped and turned over to *respondent* (being the petitioner) and respondent had received (libelant's cargo) for *transportation*" (id.). It also alleges that the said "sacks of barley were loaded on said barge 'Tennessee' and under tow of the said stern wheel steamer 'San Joaquin No. 4' was being *transported* * * *" (id.) Of course it was the barge which was under tow of the steamer, and not the sacks of barley, and it was the sacks of barley which were being transported. Respondent's object, in shipping under the bill of lading, was to have its barley

transported from one point to another point of the river, and he made a contract accordingly. Such a contract is called a contract of affreightment. Under the bill of lading which respondent signed, petitioner had the right, if it chose, to dispense with the barge altogether and transport the cargo on board the steamer. The suggestion of "towing" sacks of barley on a river, and of an action to recover "for the negligent towage of his cargo of barley" contains an element of humor. Had respondent been the owner of a *ship* which he wished to have moved from Celli's Landing to Port Costa, he would have made a contract of towage with petitioner; but one does not tow barley, and no owner of barley would wish it towed. The fact that respondent labeled his suit a "cause of towage" does not make it a cause of towage. This appellation was probably provided, and mention of the bill of lading so studiously avoided in the libel, for the very purpose of steering the libel around the Harter Act.

The relation existing between respondent, cargo-owner, and the "San Joaquin No. 4" does not grow out of a contract of towage, but out of the bill of lading under which respondent's cargo was being transported from one place to another place on the river. In the opinion of the Circuit Court of Appeals, the Court said: "The only express reference to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage, a reservation evidently made to obviate objection to possible delay in transportation caused by the additional load." (Trans. p. 141.) This reference to towing was a subordinate incident in the transportation of the

cargo and did not make a towage contract out of respondent's affreightment contract.

Reading the bill of lading and the libel filed in this cause, should make it clear that this is not a suit for the negligent towage of respondent's cargo, but a suit based upon the contract of affreightment made between respondent, cargo-owner, and *Sacramento Navigation Company, a common carrier,* for the transportation of respondent's cargo between two points on a river by means of the customary instrumentality used for such a purpose, viz., a steamer taking barges in tow.

This reduces the problem before the Court to a consideration of the question: What is the "vessel transporting the merchandise" in the mode of river transportation customarily used in this country, and which was used in the instant case?

We shall show that this "vessel transporting the merchandise" is the combination of a steamboat and barges attached to it, the barges being considered as belonging to the steamboat and making a part of it.

C. STEAMER PLUS BARGE IS THE VESSEL TRANSPORTING THE MERCHANDISE.

1. The Question in the Supreme Court.

The question has been practically answered by this Court in the case of *The Northern Belle,* 9 Wall. 526, where the Court, in a case involving river transportation, said:

"The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and *making part of the particular boat in connection* with which they are used; though quite often an individual or corporation owning several boats, running in a particular trade, have a large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. *In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.*" (9 Wall. 528-9.)

The opinion shows that river transportation was originally conducted by placing the cargo in the hold of the steamboat; that the competition of railroads introduced in river tranportation the use of barges; that "this mode of river transportation * * * has superseded almost entirely the old mode of carrying by sacks in the hold of the *vessel.*" The Court, throughout the opinion, consistently and strictly refers to the *steamboat* whenever the word *"vessel"* is used, never using the word "vessel" as applied to the barges, recognizing that, in the nature of the transaction, the transporting vessel is the steamboat endowed with power to move, and that the powerless barges are merely parts of the particular steamboat moving them.

If, therefore, in the instant case, the word "vessel" is used in the sense in which this Court used it in the case of *The Northern Belle,* the problem presented by the instant case is solved; for it follows that, although respondent's merchandise was deposited on the barge, the "vessel transporting the merchandise" was the steamship "San Joaquin No. 4" and the barge; hence her owners were, by the Harter Act, *not responsible*

"for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The Keokuk, 9 Wall. 517, was another case involving river transportation, and from the reasoning of the Court in that case it follows that the *steamer and barge,* under the circumstances attendant upon river transportation of cargo, is the "*vessel*" transporting the cargo.

In that case a steamer and barge were used in carrying freight. A shipper loaded the barge with wheat without knowledge of the carrier, but the barge was never delivered to the custody of the steamer. The barge with libellant's wheat sank at the dock, and a libel was filed against the *steamer and the barge.* The question was, whether there was a lien on the steamer and barge. The Court said:

> "It is very clear, had the *steamer* taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And *the steamer would be equally liable* if the barge had been left at the landing by the fault of the officers of the boat."
>
> (9 Wall. 517, 519, 520.)

In the instant case the bill of lading was executed and the steamer had taken the barge in tow; hence the steamer would (but for the Harter Act) have been liable in rem. The reasoning of the Supreme Court shows that the responsible "*vessel*" is the steamer, or at least the steamer and barge. The question was, just when does the law create a lien "on a

vessel as a security for the performance of a contract *to transport a cargo.*" (p. 519.) The "*vessel* to transport the cargo," to which the question was applied, was the *steamer and the barge.*

The barge belongs to the steamboat to which she is attached, and is a part thereof. The combination constituted the "vessel" or instrument of transportation during the voyage involved in the instant case.

2. The Question in the Ninth Circuit.

Petitioner's contention is supported by former cases decided by the Circuit Court of Appeals for the Ninth Circuit.

In the case of *The Columbia,* 73 Fed. 226, a barge lessee which was also the lessee of a tug and was operating both of them as owner, received a shipment of wheat to be transported between two points on the Columbia River. The captain of the *barge* executed a shipping receipt covering the wheat. The barge, having no motive power, was towed by the tug and when attempting to make a landing at night was so badly damaged by contact with the dock, that she later sank and damaged a large portion of the cargo. It will be noted that the facts are almost identical with those in the instant case.

The question before the Court was whether the barge and tug should both be surrendered in a proceeding commenced by the carrier to limit its liability for damages arising out of the accident. The Court said:

> "The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the

tug Ocklahama, undertook to transport the wheat from Portland to the ship Westgate. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The contract of carriage was the owners' contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug,—in this instance the tug Ocklahama, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge Columbia. When the tug made fast and took in tow the barge, to perform the contract of carriage, *the two became one vessel for the purpose of that voyage*,—as much so if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. The Northern Belle, 9 Wall. 526-529; Sturgis v. Boyer, 24 How. 110-122; The Merrimac, 2 Sawy. 595, Fed. Cas. No. 9,478; The Bordentown, 40 Fed. 686."

* * * * * * *

"In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. *They constituted the instrument of carriage*, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage."

* * * * * * *

"But no question of proximate cause, we think, arises in the case, for the reason that *the tug and barge are, in law, considered one vessel*, for the purpose of the voyage in question, and, whether

> the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender of the tug Oklahama, the Court below was in error."
>
> (73 Fed. 237-8.)

No question was raised in regard to whether one vessel was the active instrument and the other a passive instrument, as in an injury by tort. The decision was based upon the ground that the tug and barge were considered as being one vessel, engaged in a contract of carriage, for the performance of which the owners of the cargo had a lien upon both vessels—the instrument of carriage.

The Harter Act had not been passed when the accident happened and no question of exemption under that Act was involved.

However, it would seem to follow of necessity from the opinion of the Court, that in a case arising under the Harter Act, which applies to contracts of carriage, if the steamer and barge constitute a single instrument of carriage on which the owners of the cargo on the barge have a lien, then the corresponding responsibility of the owner of the instrument of carriage, as to seaworthiness and navigation, and as to faults in navigation and management, would apply to that instrument of carriage, and not to the barge alone.

The Columbia is referred to in the opinion of the Circuit Court of Appeals in the instant case as follows:

> "The Court had under consideration therein the limited liability statute, Rev. Stats. 4282-4290. It was held that where the owner of a barge undertook to transport cargo by means thereof and by its own tug, *the two vessels became one for the purpose of the voyage*, and that the owner was not entitled to limit his liability for damages caused by the negligence of the crew of either without surrendering both. We applied in that case the same rule of strict construction which has been indicated by the Supreme Court in construing the Harter Act. The purport of the decision was that the Carrier could not obtain the benefit of the limited liability statute without surrendering *the whole means by which it undertook to transport the cargo*, thus applying the principle that where two or more vessels belonging to the same person are engaged in a transportation service under a common direction, all are equally answerable for the negligence of the common head, 24 R. C. L. 1398, and the language of the Court in 'The Main' vs. Williams, 152 U. S. 122, 131, 132, where it was said: 'The real object of the Act in question was to limit the liability of vessel owners to their interest in the adventure."
>
> (Trans. p. 142.)

There would seem, therefore, to be nothing in the facts of *The Columbia* or the principles therein announced, which would warrant a distinction in the present case.

It was urged by counsel in the Court below, and will undoubtedly be urged here, that *The Columbia*

was overruled by the decision of this Court in the case of *Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal,* 251 U. S. 48.

That case, however, was one of *collision,* arising under the limitation of liability statutes, and the question was: What is the limit of liability, under the statute, of the owner of the colliding vessel to the owner of the innocent vessel? If the colliding vessel is a car float carrying cargo, lashed to the side of a steam tug, both tug and tow belonging to the same owner, must the owner surrender, under the statute, both tug and tow, or the negligent tug alone? Evidently the answer to this question must be found in the language of the limitation of liability statute, which provides as follows:

> "The liability of the owner of any vessel, for any * * * *injury by collision* * * * shall in no case exceed the amount or value of the interest of such owner in such vessel. * * * "
>
> (Section 4283-R. S.)

In order to arrive at the interest of the owner in the offending vessel, it was necessary to differentiate between the two vessels and to determine *which one* of the two vessels committed the *injury.*

This Court held that under the statute, the value of the tug alone was the limit of the owner's liability, on the grounds that *"for the purpose of liability, the passive instrument of the harm* (the car float) *does not become one with the actively responsible vessel* (the tug); and that, under the language of the statute, the owner is free if he surrenders *'the offending vessel'."*

The Columbia, however, was not a collision case, but arose under a contract of affreightment, as in the present case. There was no mention of *The Columbia* in the *Liverpool* opinion, and the Court stated:

> "Earlier cases in the Second Circuit had disposed of the question there, *and those in other circuits for the most part if not wholly are reconcilable with them.*"
>
> (251 U. S. 54.)

This would seem to indicate that there was no intention to overrule *The Columbia,* arising out of a contract of affreightment by the *Liverpool* case, which involved an entirely different question.

In fact the distinction between the two kinds of cases was admitted by counsel in the argument of the *Liverpool* case before this Court, when they said:

> "We also agree that the fact that the vessels are to be regarded as one for the purposes of a joint undertaking of their owner may have no bearing upon the question of their respective liabilities *in rem.* But neither of these considerations has any bearing upon the question of what must be surrendered by a respondent as a condition of limiting his liability."
>
> (251 U. S. 50.)

The rule announced in *The Columbia* was followed in the Ninth Circuit in a later case, *The Seven Bells,* 241 Fed. 43.

In that case the cargo owner sued to recover for merchandise which was lost while being transported by water from San Francisco to San Rafael. The goods were loaded on a barge operated by a transportation company, and bills of lading were issued cover-

ing the merchandise, as in the instant case. The barge was towed by the launch "Seven Bells," owned by a third party, under a contract with the transportation company covering the services of the launch.

The barge and owners, and the launch were all joined as respondents in the action. The owners of the launch sought to escape liability upon the ground that they were not common carriers, and had no relations with the shipper of the goods, but that their contract was one of towage with the owners of t barge, under which contract they were only obliged to use ordinary care. (In the instant case the contention of the parties is just the reverse—the shipper, in order to avoid the Harter Act, contends that the relationship is based upon a contract of towage, while the carrier asserts that the contract was one of affreightment and invokes the Harter Act.)

The Circuit Court of Appeals held in favor of the shipper, (exactly as the petitioner is contending here), that the contract was not one of towage, but of carriage, stating:

> "That was not, in our opinion, a mere contract of towage, but one of carriage, and under it we think the launch and the barge became *one instrumentality* in the voyage; the owner of the barge becoming owner of the launch *pro hac vice*, and *the liability of the one instrumentality that of carrier*. The Columbia, 73 Fed. 226; 19 C. C. A. 436, and cases there cited."
>
> (241 Fed. 45.)

The barge owners set up the Harter Act as a defense, but the Court held them liable not on the ground that the Harter Act did not apply, but on the ground that the

combination of launch and barge were not sufficient during the winter weather for the business in which they were engaged. In other words, the combination was unseaworthy and therefore the Harter Act could not be used as a defense.

In the opinion in the instant case the Court, in referring to *The Seven Bells,* said:

> "It is true that in that case the Harter Act was set up as a defense, but it was not involved in the decision, as the owner of the cargo recovered judgment for his damages on the ground that the tug was insufficiently equipped to handle the barge."
>
> (Trans. p. 143.)

It is respectfully submitted that the finding in that case, that the tug was unseaworthy and the conclusion drawn therefrom that the Harter Act does not apply, involves impliedly the conclusion that tug and tow "became *one instrumentality*" and are, within the scope of the Harter Act, the "vessel transporting merchandise" on the particular voyage; for, had the barge alone been considered as the "vessel transporting merchandise," the seaworthiness of the barge would be the only question involved and the seaworthiness of the tug would not be material. *The Seven Bells* is therefore authority in favor of petitioner's contention.

As in the case of *The Columbia,* the facts in *The Seven Bells* so closely resemble the facts in the present case that it is impossible to perceive the distinction that the Circuit Court of Appeals attempted to draw.

In *The Thielbek,* 241 Fed. 209, the same Court held that a tug and bark, being lashed together for the purpose of towing the bark, become one vessel for the purpose of navigation.

3. The Question in the Alabama District Court.

In *The Nettie Quill* (Southern District of Alabama), 124 Fed. 667, a river steamboat, engaged in carrying cargo as a common carrier, agreed to transport libelant's locomotive up the river, libelant furnishing the barge on which the locomotive was loaded, both being thereupon delivered to the steamboat. The barge was lashed to the steamboat. As the steamboat and barge proceeded up the river, the barge struck a log, was sunk and dumped the locomotive into the river. Assuming that the loss arose from faults in navigation, the Court held that the steamboat and her owners were not responsible for the loss, under the Harter Act. The Court said:

> "The barge was furnished. It was lashed to the steamboat, and became thereby as much *a part of her* as her own barge was, for the purposes of the particular voyage. * * * The contract being a contract of affreightment, if the loss arose from dangers of the river, or resulted from faults or errors in navigation or in the management of the steamboat, then, under the act of Congress known as the 'Harter Act', the steamboat and her owners would not be responsible for the damage or loss."
>
> (124 Fed. 669.)

The Circuit Court of Appeals in the instant case distinguishes the case of *The Nettie Quill* as follows:

> "In holding that the contract was one of affreightment the Court said: 'A contract of af-

> freightment is a contract with a ship owner to hire his ship or part of it for the carriage of goods or other property.' We may point to that expression of the Court as the distinguishing feature of the decision. It serves also to distinguish that case from the case at bar. for here there was no contract with the tug, and there was no hiring of the tug for carriage of the cargo."
>
> (Trans. p. 144.)

We respectfully submit that the contract in the instant case was a contract of affreightment, as it was in *The Nettie Quill* case; in both cases there was a hiring of the tug for carriage of the cargo. Respondent could not have thought of the powerless barge "Tennessee" as the instrument for the moving of his cargo down the river. If he had been disposed to so think of it, his bill of lading would have advised him that a steamboat would be used in the transportation as part of the instrument of carriage and possibly the sole instrument; for the carrier had the right under the bill of lading to take the barley from the barge, reload it on the steamer and carry it down the river on board the steamboat. Primarily there was a contract with the Sacramento Navigation Company, petitioner, for transportation by steamboat.

4. The Question on Principle.

The foregoing authorities support the principle that the *"vessel transporting merchandise", to or from* a port, in the customary method of river transportation, is not the lifeless barge, but is the *steamboat-plus-barge*, used as a unit of transportation. How could there be a *voyage* by means of a powerless barge?

How could a motionless barge be a *"vessel transporting* merchandise * * * *to* or *from* any port"? How is "navigation" conceivable without motion, without power to move; how could the powerless barge alone be conceived of as an instrument of transportation of merchandise from one point of the river to another point of the river?

The *ratio decidendi* stated in the opinions of the Courts below is based upon an erroneous construction of the contract.

The *District Court* said:

> "The grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' under a bill of lading *issued for it only and not for the towing steamer,* and though the towing steamer and the barge belonged to the same owner, the Harter Act does not apply."
>
> (Trans. p. 117.)

The *Circuit Court of Appeals* said:

> "There was no contract here between the appellee and the barge and the tug. The bill of lading was made *with the barge* and did not include the tug, and there is nothing therein to indicate that the tug and the tow were engaged in a common venture. Since the barge had no power of her own there was an implied contract that a tug would be furnished by the appellant to carry her to her destination. The only express reference to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage, a reservation evidently made to obviate objection to possible delay in transportation caused by the additional load."
>
> (Trans. p. 141.)

To sum up, the District Court said that the bill of lading was "issued *for* it (the barge) only and not *for* the towing steamer"; the Circuit Court of Appeals said that "the bill of lading was made *with* the barge and did not include the tug". We submit that the bill of lading shows a contract between E. Salz & Sons and Sacramento Transportation Company, both of whom signed the bill of lading by their respective agents. It was certainly not a contract *with* the barge or even with the captain or other navigator of the barge, nor does it appear that the barge has any captain or navigator. It was not a contract with the transportation company *for* the barge *only*. It was a contract with the petitioner herein for the transportation of respondent's merchandise by means of the customary instrumentality for river transportation, viz., the specified barge and an unspecified steamer referred to in the bill of lading. We submit that the Circuit Court of Appeals erred in holding "that there is nothing therein (the bill of lading) to indicate that the tug and the tow were engaged in a common venture". The goods could not be "delivered at Port Costa" (a point lower down the river) without moving the barge from Celli's Landing to Port Costa. The contract referred to "*navigation*" and to "peril or danger of the seas, rivers or *steam navigation*". The steamer which was to and did tow the barge, and the barge herself, were necessarily engaged in the common venture of transporting respondent's goods from the point of shipment to Port Costa. This would seem to follow also from another finding of the Circuit Court of Appeals that, "there was an implied

contract that a tug would be furnished by the appellant to carry her to her destination". Assuming an *express* contract that the cargo shipped on a barge should be transported to a distant destination, and a simultaneous *implied* contract that the barge should be towed to destination by a tug, is there any escape from the conclusion that *barge and tug* were to engage in the common venture, whereby respondent's goods should eventually be delivered at destination?

D. ANALYSIS OF THE TWO CASES UPON WHICH THE OPINION OF THE CIRCUIT COURT OF APPEALS RESTS.

The Circuit Court of Appeals rests its decision upon two cases, viz., *The Murrell,* 200 Fed. 826, (affirmed in *Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483), and *The Coastwise,* 230 Fed. 505 (affirmed in 233 Fed. 1), saying on the authority of these cases:

> "We are of the opinion that the Harter Act applies only to the relation of a vessel to the cargo with which she is herself laden and does not relieve the owner of a tug from liability for its negligence in towing the barge on which the cargo is carried."
>
> (Trans. p. 143.)

It should be noted, in connection with the two cases in the First Circuit, that the *Coastwise* case does not consider the question involved on principle, but simply follows the binding authority of the *Murrell* case, previously decided in the same Circuit. The District Court said, in the *Coastwise* case:

> "Does the Harter Act relieve the tug from liability? As an original question, I should regard this as a doubtful, as it certainly is an important, one; but I think it has been *closed, so far as this court is concerned,* by the decision in Baltimore & Boston Barge Co v. Eastern Coal Co. (C. C. A. 1st Circuit), 195 Fed. 483."
>
> (230 Fed. 505, 509.)

One distinguishing feature of both of these cases is that neither involves the customary river transportation by means of steamboat-plus-barge in tow. We now proceed to point out other points of distinction.

1. The *Murrell* case, supra, is distinguishable from the instant case by the following facts, which we consider fundamental:

(a) The *Murrell* case was not a case of a contract of affreightment, but "the case of an agreement by the owner of a tug to tow another owner's vessel".

(233 Fed. p. 3.)

(b) In the *Murrell* case the District Court stressed the fact that

> "Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal."
>
> (200 Fed. 831.)

In the instant case the Circuit Court of Appeals found as follows:

> "There was an *implied contract* that a tug would be furnished by the appellant to carry her to her destination. The only *express reference* to a tug was that the carrier reserved the privilege of towing with one tug other barges in the course of the voyage."
>
> (Trans. p. 141.)

An inspection of the bill of lading shows that steam navigation was contemplated by the parties as the mode of transportation, and the carrier was given the privilege of towing two or more barges "with one steamer". The contract of transportation made with respondent, the owner of the cargo, connected respondent expressly with the steamboat of the carrier. Respondent knew, before the barge was taken in tow by the steamer, that his cargo would be transported by a steamer to be connected with the barge; that steamer-plus-barge would be the instrument of transportation. Respondent even knew that, under the contract, petitioner had the privilege of re-shipping the cargo on the steamer "San Joaquin No. 4" before the actual transportation commenced; that therefore the cargo might either remain "cargo on board the barge" or become literally the cargo of the steamer.

(c) In the *Murrell* case the owner of barge and tug instituted *limitation proceedings* and surrendered the *tug only,* making the contention that tug and barge were not one vessel, but were distinct. The Court properly held that the owner was thereby precluded from contending that both vessels could, for another purpose, be treated as one, saying:

> "Moreover, while it is true that the tug was taking part in the transportation of the cargo,

> and that *tug and tow, even when not make fast alongside each other, are to be regarded as one vessel for many purposes,* so to regard them in this case, in order to call cargo on board the barge cargo of the tug, and thus bring the case under the Harter Act, is to permit the petitioner to treat both vessels as one in a proceeding instituted by him on the theory that they are distinct and independent. If this cargo is to be regarded as the tug's cargo and the tug's contract one of affreightment, as in The Nettie Quill, because both vessels are one as regards the cargo, justice would seem to require that both vessels should be liable for the fault of either, and that both should be surrendered in order to limit the liability to the cargo owner incurred by the negligence of either."
>
> (200 Fed. 832.)

In the instant case no limitation proceedings have been instituted; petitioner is in nowise embarrassed in its contention by any facts or contentions inconsistent with its claim under the Harter Act.

(d) The *Murrell* case was considered on appeal to the Circuit Court of Appeals for the First Circuit. (*Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483.) It is interesting to note that the latter Court is, on principle, wholly with this petitioner on the contention involved in the instant case, but that its decision affirming the lower Court is reluctantly adverse to our contention by reason of a misconception of certain cases in the Supreme Court to be discussed hereafter. The Court said:

> "We cannot overlook the fact that in this case the relations of the tug to the cargo of the West Virginia were not merely those of tug and tow, but perhaps, also, those of the owner of a vessel and the owner of a cargo; so that, at common law, the

liability of the tug was not merely for ordinary care, but perhaps that of the guaranty which a common carrier gives the person whose merchandise he transports. Consequently, if in this case the loss of the cargo had arisen through errors in the navigation of the barge West Virginia, arising aboard of her, the Harter Act would perhaps apply. It cannot, perhaps, be denied that *the tug was 'transporting' the cargo of the West Virginia;* nor can it, perhaps, be denied that the *relations of the tug to the cargo were within the equity of the statute,* which was intended to relieve seagoing vessels from the extreme liability at common law of carriers towards the owners of the merchandise carried. These are very serious questions, as a very large portion of the coal traffic now on the Atlantic Coast is conducted in the manner shown here. *The owners of the tugs are transporting cargoes for which they receive freight; not merely towing barges."*

(195 Fed. 485.)

It thus appears that the Circuit Court of Appeals for the First Circuit would find that the relation between the steamer "San Joaquin No. 4" and the barge "Tennessee" is not merely that between tug and tow, but that the steamer "San Joaquin No. 4" was really *"transporting"* the cargo of the barge "Tennessee".

A decisive factor is undoubtedly that the same Circuit Court of Appeals does not consider the *Murrell* case as one based upon a contract of affreightment, but, as the Court says, in *The Coastwise:*

"It will be seen that, in The Murrell, this court had before it *the case of an agreement by the owner of a tug to tow another owner's vessel;* and this court held that there is nothing in such

> agreement to make the latter vessel, or her cargo, the cargo of the tug."
>
> (233 Fed. p. 3.)

The instant case is not the case of an agreement by the owner of the steamer "San Joaquin No. 4" to tow the barge of another owner; both steamer and barge belong to the same owner, and there is no towage agreement in the case.

In spite of arguments which point on principle to the opposite conclusion, the Circuit Court of Appeals affirmed the decision of the District Court, basing its affirmance upon the following language applied to the Harter Act in the case of *The Irrawaddy*, 171 U. S. 187:

> "Upon the whole, we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."
>
> (171 U. S. pp. 195-6.)

This was said in a case of transportation on the high seas in one cargo steamer, not involving the fundamental question of the instant case. We contend that the Harter Act had in mind the relations which exist between merchandise to be transported by water (whether high seas or inland), and the vessel transporting the merchandise.

We are not asking for relief beyond that called for by the language itself of the statute.

2. *The Coastwise,* supra, is distinguishable from the instant case in the following particulars:

(a) One distinctive fact is that, in that case, the barge was not a public carrier at all, but *was let by her owner by charter to the cargo owner,* to carry a cargo between two ports. The tug was not chartered, but was used by its owner to tow the barge. The case was, therefore, a case of private carriage. This fact alone is decisive; for the Harter Act does not apply to private carriers; its language applies to "any bill of lading or shipping document," and not to charter-parties. (*The Fri,* 154 Fed. 333; *The G. R. Crowe,* 294 Fed. 506.) While this decisive fact is not referred to in the arguments or opinions of either the District Court or the Circuit Court of Appeals, it eliminates this case as an authority which could control the instant case.

The District Court said:

> "Does the Harter Act relieve the tug from liability? As an original question, I should regard this as a doubtful, as it certainly is an important one; but I think it has been *closed,* so far as this Court is concerned, *by* the decision in *Baltimore & Boston Barge Co. v. Eastern Coal Co.* (C. C. A. 1st Circuit) 195 Fed. 483."
>
> (230 Fed. 505, 509.)

(b) In *The Coastwise* the "cargo was put upon the claimant's barge, under a bill of lading signed by the *captain of the barge.*"

The Court said:

> "Here the contract of towage was made by the tug; the bill of lading for the cargo was made by

> the barge. It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well."
>
> (233 Fed. p. 3.)

The facts in the instant case are different. Here barge and steamboat are both owned by petitioner and used in its business as one instrument of river transportation. The bill of lading was not signed by a person representing the barge, but by the transportation company, by its agent, as owner of the steamer and barge, and it referred to the use of a steamer in the transportation. Petitioner makes no contention that respondent's cargo was at one time, or ever, the cargo of the barge alone, and at a later time the cargo of the tug as well. Petitioner's contention is that the cargo was at all times the cargo of the instrument of transportation used by petitioner in the river traffic, viz., the cargo of steamer-plus-barge.

(c) Another distinction between *The Coastwise* and the instant case is, that the former involved a contract of towage, whereas the latter involves a contract of affreightment. The Circuit Court of Appeals said, in *The Coastwise:*

> "Here the contract with the tug was clearly a contract of towage. The bill of lading was made with the barge only, not with the tug. There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure."
>
> (233 Fed. 3, 4.)

In the instant case the contract was not a contract of towage; the bill of lading was not made with the barge, or the captain of the barge, but with the petitioner as owner of the transporting instrumentality customarily used in the carriage of cargoes such as respondent's. The contract expressly shows that, for the purpose of the transportation, a steamer would be combined with the barge in the particular maritime adventure contemplated by the contract; but apart from the contract, the universal and well-known custom prevailing in river transportation combined the steamer and the barge into the transporting vessel used for the particular maritime adventure. Steamer-plus-barge was the "vessel transporting the merchandise" as referred to in the Harter Act.

E. THE DELAWARE AND THE IRRAWADDY DO NOT SUPPORT THE DOCTRINE OF THE MURRELL AND THE COASTWISE, NOR THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE INSTANT CASE.

Both *The Murrell* and *The Coastwise* were somewhat reluctantly decided, the Courts feeling bound by the supposed authority of the above cases in the Supreme Court. We think we have effectively pointed out the decisive distinctions between *The Murrell* and *The Coastwise* on the one hand and the instant case on the other, so that the petitioner's contentions should prevail even on the assumption that these cases were correctly decided. But we go further and maintain that, even on the assumption that the distinctions pointed out be held to be insufficiently persuasive, there is nothing in the cases in the Supreme

Court which could govern the questions raised by the facts in this or even the *Murrell* case, or which should have prevented the Circuit Court of Appeals of the First Circuit, in the *Murrell* case, from following the logic of the principle to which it inclined and from holding that the Harter Act applied to the circumstances of this case.

The Delaware, 161 U. S. 459, was a case of collision between a steam tug and the steamship "Delaware", which occurred in the year 1893, shortly after the Harter Act was passed. The "Delaware" was found at fault, and one of the questions considered was whether she was exempted from liability to the tug by reason of Section 3 of the Harter Act. This was the first case before this Court on the construction of the Act. The Court reviewed the history of the Act and stated:

> "It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. * * *
>
> "These provisions have no possible application to the relations of one vessel to another, and are mainly a re-enactment of certain well-known provisions of the common law applicable to the duties and liabilities of vessels to their cargoes."
>
> (161 U. S., pp. 471, 474.)

The facts presented in *The Delaware* do not have the remotest resemblance to those in the instant case. That was an action in tort by the tug against the other vessel to recover damages for collision. The tug was not towing "The Delaware" or connected with her in any way, but the vessels were on crossing

courses. No question of cargo liability was involved, nor was there any discussion of the relations between a tug and her tow. The only point decided, on the facts before the Court, was that in a collision between two vessels, the vessel at fault could not escape liability for the other's damage, by reason of anything in the Harter Act.

Clearly, the instant case does not involve the relation of one vessel to another, but, to use the language of the Court, involves "the duties and liabilities of vessels to their cargoes", and therefore the provisions of the Harter Act.

The *Irrawaddy*, 171 U. S. 187, is cited by the Circuit Court of Appeals for the First Circuit in both the *Murrell* and the *Coastwise* cases, and also by the Circuit Court of Appeals in the instant case (Trans. p. 141), to support the conclusion that the Harter Act "is dealing with the specific vessel on which the merchandise is being transported". This conclusion seems to be based upon the following language of this Court (171 U. S. at pages 195 and 196), which is cited in the *Murrell* case (195 Fed. 485):

> "Upon the whole we think that, in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."

Thus there remains the problem of finding a proper answer to the general question:

> What relief from the operation of general principles is called for by *the language itself* of the Harter Act?

Applied to the facts of the *Irrawaddy* case, the specific question was:

Has the shipowner, by virtue of the Harter Act, a right to general average contribution from the cargo, where his vessel stranded by the negligence of her master? The Court held that the Harter Act called for no such relief, but that the specific question was governed by general and well-settled principles. The reason for the decision was that the Court could not say from the language used in the Act that it was the intention of Congress to allow the owner, whose master's negligence caused the stranding, to share in the benefits of a general average contribution.

There is a long step between exempting the shipowner from responsibility "for damage or loss resulting from faults or errors in navigation" and allowing the shipowner to share in the benefits of a general average contribution. The Court refused to include the latter relief within the scope of the Harter Act, saying:

> "Plainly the main purposes of the act were * * * *to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation* * * *."
>
> (171 U. S. 192.)

Now, as applied to the customary river navigation exemplified in this case, "the ship", or instrument of transportation, is the *steamer-plus-barge.* It must be conceded that the Act applies to all transportation of merchandise by vessel, including river transportation. It follows therefore, that, with reference to the latter kind of transportation, plainly one of the purposes

of the Act was to exempt the shipowner from damage or loss resulting from faults or errors in navigation or in the management of the ship, or instrument of transportation, used in the commerce carried on the rivers of this country.

In other words, we answer the general test question propounded by the Court in the *Irrawaddy* case by saying that, as applied to the case of river transportation, *the language itself* of the Harter Act calls for *this* relief from the operation of general principles: That if the owner of the instrumentality transporting merchandise on a river exercises due diligence to make his instrumentality in all respects seaworthy, such owner is not responsible for damage or loss resulting from faults or errors in navigation or in the management of said instrumentality, by the language itself of the Act.

Whereas a decision that the Harter Act gives the negligent shipowner a right to general average contribution would have extended the operation of the Harter Act beyond the language itself of the statute, a decision that the Harter Act gives the same relief to the common carrier of cargoes on our rivers which it affords to the common carrier on the high seas is "called for by the statute".

The Harter Act is entitled "An Act relating to *navigation of vessels*"; it applies to "*any* vessel transporting merchandise or property from or between ports of the United States". Navigation connotes the *power to move as directed;* an Act relating to navigation of vessels relates, therefore, to instrumentalities

which have the power to move as directed by the navigator. No reason can be suggested why the Act should not apply to a vessel transporting merchandise on rivers, or why the owner of such a vessel should not receive its benefit as much as the owner of ocean-carrying vessels. In fine, the Act applies to the instant case, where merchandise was transported under a bill of lading, the navigation being conducted on a river by the instrument of navigation customary in such cases.

III. IRRESPECTIVE OF THE HARTER ACT PETITIONER IS EXEMPTED FROM LIABILITY BY THE TERMS OF THE CONTRACT.

A. ADOPTING THE VIEW OF THE CIRCUIT COURT OF APPEALS, THAT THE BILL OF LADING CONTRACT IS A CONTRACT WITH THE BARGE ONLY, STILL PETITIONER IS EXCUSED BY ITS TERMS.

The exceptive clause in the bill of lading reads as follows:

> "Dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature, excepted."
>
> (Original exhibit—filed in Supreme Court.)

The Circuit Court of Appeals held that these exceptions "apply only to the barge and not to the tug or to any other vessel, or to the appellant as the owner of the tug". (Trans. p. 145.) However, the barge has no steam or other power, nor steam machinery; without another vessel or tug it is not exposed to dangers of navigation, or steam navigation, or steam machinery. The towing of the barge with a steamer is referred to in the same bill of lading; it would there-

fore seem to be conclusive that the dangers of "steam navigation, or steam machinery", referred to in the exceptive clause, purport to be dangers connected with the steamer towing the barge. Furthermore, the exceptive clause excuses the owner from delivering the barley shipped on the barge at Port Costa, if prevented by "any other accident or danger of the rivers". As applied to the customary method of river transportation, an accident or danger of the rivers includes a collision caused by the negligence of the tug which takes the barge in tow in the regular course of the transportation.

B. ADOPTING RESPONDENT'S VIEW THAT THE CONTRACT IS A CONTRACT TO TOW THE BARLEY, STILL PETITIONER IS EXCUSED BY ITS TERMS.

The Circuit Court of Appeals does not appear to have endorsed the view that this case involves a towage contract. Both lower Courts refer to the contract as a "bill of lading". However, respondent has persistently maintained the contention that the suit is brought against petitioner as owner of the towing steamer and not as owner of the barge, for *"the negligent towage of his cargo of barley"*. He claims, however, that the exceptive clauses are not intended to cover negligent towage, and that, if they were, they would be invalid under the law of tug and tow.

In our opinion this contention is inconsistent with the theory of the Circuit Court of Appeals; for how could the contract in question be a contract of affreightment, i. e., a bill of lading, and at the same time a towage contract forming the basis for a suit against

the owner of the tug for negligent towage? We contend that the lower Courts are correct in considering the contract as one of transportation or affreightment (a bill of lading), and it seems quite plain to us that the contract in the suit cannot be construed as a towage contract without violation of its terms and disregard of the circumstances.

1. Assuming the Contract to be One of Towage, the Exceptive Clause Excuses Negligent Towage.

The principles of the law of towage are distinct from those of the law applying to common carriers. The owner of the towboat is, by the general law, only liable for negligence in the performance of the towage service; he is not liable for dangers of navigation unaccompanied by negligence; there is no need of his protecting himself against liability for such risks. If, therefore, he makes an express contract that, in this particular towage operation, dangers of navigation *"of whatever kind or nature"* are excepted, he clearly intends to relieve himself from risks for which, but for the stipulation, he would be liable.

In *"The Oceanica"*, 170 Fed. 893 (C. C. A. 2d), the Court said (p. 894):

> "It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may be in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. *Unless construed to cover the tug's negligence, the stipulation is meaningless.*"

This Court denied a writ of certiorari in the case cited. (215 U. S. 599.)

We appreciate that, in the case of a bill of lading like *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, the words "perils of navigation of whatever kind" do not include perils of that kind which arise from negligence; for there is, in a case of common carriage, a margin of risk outside of negligence, upon which the clause can operate. On the other hand, in the case of responsibility for towage, "perils of navigation of whatever kind" have, after the elimination of purely accidental perils, nothing to operate upon except the negligence of those who do the towing.

2. Clauses Purporting to Excuse Negligent Towage Are Valid.

Respondent has strenuously contended that, in the law of towage, clauses purporting to excuse the owner of the tug from liability for damage caused to the tow or its cargo by the negligence of the tug's navigator are against public policy and therefore void.

This raises an important question, upon which there is a conflict at present among the lower federal Courts. The Circuit Court of Appeals for the Second Circuit has held that such contractual exemptions are valid and binding; on the other hand the Circuit Court of Appeals for the Ninth Circuit has held that such contracts are against public policy and void.

The Supreme Court has never squarely decided this question. Respondent contends that it was decided in his favor in *The Syracuse*, 12 Wall. 167; we, on the other hand, contend that the language relied upon by

respondent is merely *obiter dictum* and that, on the contrary, this Court supports our contention, at least by implication, in the recent case of *British Columbia Mills Tug & Barge Co. v. Mylroie,* 259 U. S. 1.

We now proceed to discuss this question.

In *The Oceanica,* supra, the Court upheld the right of a tug to contract against her own negligence.

In *The Maine,* 151 Fed. 401; affirmed 170 Fed. 915 (C. C. A. 2d), a lighterage company furnished the barge upon which libelant's cargo was carried, and the tug which towed the barge. The contract provided that the shipper should have no claim for any loss of cargo. This clause was attacked on the ground that it was void as against public policy, but the District Court and Circuit Court of Appeals held that the clause is valid.

The G. R. Crowe, 287 Fed. 426; affirmed 294 Fed. 506 (C. C. A. 2d) (certiorari denied—264 U. S. 586), involved the right of a private carrier to stipulate against damage caused by its own negligence. Referring to the clause: "The steamer is not to be accountable for leakage," the District Court said:

> "This exception covers the shipowner's *negligence*, because that is the only case in which a private carrier, as bailee for transportation, and not as insurer, is liable at all." (287 Fed. 427.)

The Court held that, by virtue of the clause, the carrier was exempted from liability for damage due to his own negligence. The Circuit Court of Appeals quoted with approval the opinion in the case of *The Fri,* 154 Fed. 338, in which it was stated:

> "It has not yet been decided by any court that a condition in such a contract, to which the Harter Act has no application, relieving a shipowner from liability on account of the carelessness of its employees, is contrary to public policy." (294 Fed. 508.)

The Circuit Court of Appeals for the Ninth Circuit, in its opinion in the instant case, has apparently come to the opposite conclusion, saying with reference to the right of a tug to contract against her own negligence:

> "We think that it is a departure from the principles announced in the decisions of the Supreme Court which we have cited." (Trans. p. 146.)

The decisions referred to are: *The Steamer "Syracuse",* 12 Wall. 167; *Liverpool Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397. As to the latter case, it seems quite evident to us that it does not decide the point involved here, for the obvious reason that it affects the liabilities of common carriers, and not of private carriers or towboat men; that, as referred to common carriers, the exception "dangers of navigation of whatever kind" does not touch the negligence of the carrier, whereas, in the case of private carriers and towboat men, the exception sweeps away the liability for negligence.

As to *The Syracuse,* the language relied upon by respondent was *obiter dictum.* The question before the Court was not, what the clause meant, or whether or not it was invalid. That the case is so considered by the Supreme Court, and not as a decision upon the question, seems to follow from the subsequent

position which the Supreme Court has taken with reference to the question, and which we will discuss hereafter.

In the *Oceanica* case, supra, the Circuit Court of Appeals for the Second Circuit discussed the *Syracuse* case, reached the conclusion that the Supreme Court did not decide the point, and thereupon decided the point independently and adversely to the contention of respondent and the view of the lower Court herein. Thereafter the *Oceanica* case was before the Supreme Court by a petition for certiorari which was denied. (215 U. S. 599.) A reasonable inference from the denial of the petition is, that the Supreme Court did not consider the decision in the *Oceanica* case to be in conflict with what the Supreme Court had previously decided upon so important a question.

This case has since been followed in the Second Circuit in *Monk v. Steamboat Company*, 198 Fed. 472, and *Ten Eyck v. Director General of Railroads*, 267 Fed. 974.

The question under discussion had significant light thrown upon it in the history of the case of *Mylroie v. British Columbia Mills Tug & Barge Co.*, (C. C. A. 9th), 268 Fed. 449. In that case the Circuit Court of Appeals for the Ninth Circuit refused to follow the *Oceanica* and held that a tug is not allowed by law to avoid by contract the consequences of its own negligence. Petition for certiorari was granted by this Court (255 U. S. 566), and the judgment of the Circuit Court of Appeals was affirmed (259 U. S. 1). The Supreme Court, however, did not decide the question,

but decided the case on other points, stating: *"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void."* (259 U. S. 12.) Had the Court adopted the view taken by the Circuit Court of Appeals, it would have held that the contention on behalf of the barge, that the exemption clause is void, was settled in its favor by the decision of the *Syracuse* case.

In fact the discussion of this question in the opinion of the Court (259 U. S. pages 11-12) shows quite clearly that the *dictum* in the *Syracuse* case, relied upon by respondent, is not considered by this Court to be the law settling this question. Suppose it were true that the *Syracuse* case had decided that a towboat company cannot by contract exempt itself from damages caused by the negligence of the navigator of the tug, the discussion in the *Mylroie* case would have taken a different turn. The Court said:

> "The agreement of the tug to render to the barge reasonable assistance from time to time in any emergency which might arise, and the exemption of the tug company from liability for any damage which might happen to the barge or its cargo while in tow, seem in conflict, but it is our duty to reconcile them if we can." (259 U. S. 11.)

If the supposed *Syracuse* doctrine had been the law, the obvious and easy way to reconcile the conflict would have been to apply the supposed doctrine to "the exemption of the tug company from liability for any damage which might happen to the barge or its cargo while in tow", and, following the *Syracuse*

case, to hold that this exemption is void. No resort to construction, no citation and discussion of the House of Lords case (259 U. S. 11-12) would have been necessary in aid of the construction. The fact that the Court considered the problem before it to be the reconciliation of two clauses seemingly in conflict, by finding the true construction of both clauses, seems to be a conclusive indication that the Court would consider the exemption clause, standing alone, as being valid and binding upon the parties to a towage contract.

The *Syracuse* case is thoroughly and ably analyzed in the case of the *Pacific Maru,* recently decided in the District Court for the Southern District of Georgia (8 Fed. (2nd) p. 166). The Court there shows clearly that no argument was urged upon the Supreme Court that the contract exempted the *Syracuse* from liability for its negligence; that the answer contained no plea of exemption from liability for negligence; that this issue was therefore not before the Supreme Court, and that the language used in the opinion was *obiter.*

Certainly a decision on the validity of a contract exempting from liability for damages caused by negligence was not necessary to the decision of the *Syracuse* case, and the question, whether the contract exempting a tug from liability for negligence is valid, or void as against public policy, still awaits an express answer by the Supreme Court. An implied answer, we think, has been given in the *Mylroie* case.

In the *Pacific Maru* case (page 172), the Court said:

> "The question of the right of a towboat to exempt itself from liability for negligence has been a subject in the minds of lawyers and the operators of such boats for many years."

The Circuit Court of Appeals for the Second Circuit has answered this question in the affirmative, the Circuit Court of Appeals for the Ninth Circuit has answered the same question in the negative. It is a question of great importance to the shipping world and awaits the decisive answer of this supreme tribunal. On principle there is no question of public policy involved in a case of towage, as in the case of a common carrier.

It is settled that the parties in a case where public policy does not forbid have the right to provide against liability for negligence.

Hartford Fire Ins. Co. v. Chicago etc. Ry. Co., 175 U. S. 91;
McCormick v. Shippy, 124 Fed. 48.

In *B. & O. R. R. v. Voight*, 176 U. S. 498, this Court held that an express messenger in an express car may by contract exonerate the railroad company from liability to him, such a contract not contravening public policy. The reason stated is that the railroad company does not assume towards him the obligations of a common carrier; that as to him it assumes the obligations of a private carrier; that a private carrier is free to contract as to the conditions of the carriage, and no reason of public policy forbids such carrier

from stipulating against its own negligence and making it a part of the contract.

In *Ten Eyck v. Director General of Railroads,* 267 Fed. 974, the Circuit Court of Appeals for the Second Circuit was urged to rule "that public policy forbids the enforcement of a condition of the contract relieving the tugs employed in the service from responsibility for any damage done to the tow through negligence of the master or crew of the tug while engaged in the performance of towage service", but held that such a contract is not invalid as against public policy.

In *The Pacific Maru* (supra), the District Court for the Southern District of Georgia, after an exhaustive review of the authorities and thorough consideration of the principles, held that the provision in question is not contrary to public policy and is valid.

It is reasonable that a towing company, in making its contracts, should take into consideration not merely the cost of its services and a reasonable profit thereon, but also the great risk of large losses naturally attendant upon its business. In that respect it is in a different position from a common carrier. Another point of distinction is that the owner of the tug, and the owner of a tow, are more nearly in a position of equality than the shipper and common carrier in their relation to one another, so that there is less inherent necessity for the protection of the owner of the tow against the owner of the tug and a stronger reason for letting them make their contracts as they choose. Another distinctive feature is that the shipper class is enormously larger than the class of owners of vessels to be towed, so that a greater necessity exists for pro-

tection. And a further ground of distinction is that, when the shipper entrusts his goods to the railroad or steamship, he relinquishes all control thereof and trusts perforce exclusively to the skill and diligence of the carrier in handling his goods, whereas the owner of the vessel to be towed may, and usually does, maintain partial control of his property and is therefore in a position to counteract the possible negligence of the owner of the towboat. Any of these reasons, and others that could be suggested, are sufficient for making a distinction, in the minds of the same Court, between the power of the common carrier to exempt himself by contract from liability for his negligence, and the corresponding power of the owner of a towboat, and for coming to the conclusion that public policy denies this power to the common carrier, whereas it concedes it to the towboat man.

It may be proper to again call attention to the fact that the argument touching upon this question of public policy is predicated upon the theoretical assumption that respondent's contention on this phase is correct. Petitioner, of course, has no intention to abandon its strong conviction that the contract before the Court is not a towage contract, and has none of the features of a towage contract, but that it is in fact a contract of affreightment, evidenced by a bill of lading, between respondent shipper and petitioner, a common carrier of merchandise by river boats, and that, therefore, the Harter Act governs the instant case.

For the foregoing reasons the decree of the Circuit Court of Appeals, entered in this case on January

26, 1925 (Trans. p. 147), and the decree of the District Court, entered on February 26, 1924 (Trans. p. 120), should be ordered reversed, and a decree should be entered in favor of petitioner, with its costs.

Dated, San Francisco,
January 6, 1926.

Respectfully submitted,
H. H. SANBORN,
LOUIS T. HENGSTLER,
FREDERICK W. DORR,
Proctors for Petitioner.

ANDROS, HENGSTLER & DORR,
Of Counsel.

(19)

In the Supreme Court
OF THE
United States

OCTOBER TERM [redacted] 1925

No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY (a corporation),

Petitioner,

vs.

MILTON H. SALZ, doing business as E. Salz & Son,

Respondent.

MEMORANDUM OF RESPONDENT, MILTON H. SALZ, OPPOSING PETITION FOR CERTIORARI.

S. HASKET DERBY,
CARROLL SINGLE,
Merchants Exchange Building, San Francisco,
Proctors for Respondent.

In the Supreme Court
OF THE
United States

October Term, 1924

No.

Sacramento Navigation Company (a corporation),
Petitioner,

vs.

Milton H. Salz, doing business as E. Salz & Son,
Respondent.

MEMORANDUM OF RESPONDENT, MILTON H. SALZ, OPPOSING PETITION FOR CERTIORARI.

The above named respondent, opposing the petition for a writ of certiorari, respectfully shows:

As said by this court, the jurisdiction to issue writs of certiorari is "to be exercised sparingly and only in cases of peculiar gravity and general importance, or

in order to secure uniformity of decision" (*Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 259; 60 L. Ed. 629, 633). None of these considerations apply to the case at bar.

The Facts.

Respondent brought suit "in a cause of towage and damages, civil and maritime" (Record, p. 5) and sought recovery for the *negligent towage* of his cargo of barley (loaded on petitioner's barge "Tennessee") by petitioner's steamer "San Joaquin No. 4". The barley was shipped on the barge "Tennessee" at two upper river landings for transportation to Port Costa and shipping receipts were issued by petitioner therefor. After these receipts had been issued and *after* the "Tennessee" had proceeded (in some way not shown by the record) to *Sacramento*, the barge was there picked up by the steamer "San Joaquin No. 4" (Record, pp. 25-26) and, by reason of the latter's *negligent towage*, was brought into collision with another steamer and respondent's cargo was lost.

As held by both of the lower courts the shipping receipts evidenced contracts made solely *with the barge* and not with the towing steamer, which is further borne out by the fact that a considerable part of the voyage had been accomplished before the tow began.

For purposes of convenience and the accommodation of both parties, suit was not brought *in rem* against the "San Joaquin No. 4", but *in personam* against petitioner as her owner and operator. The court should

bear in mind, despite contrary statements by petitioner, that the suit was brought against petitioner *as the owner of the towing steamer* and *not* as the owner of the barge and should be considered on the same basis as if brought *in rem* against the towing steamer. It is *not* a suit based on the contract of affreightment made with the barge, but is a suit for negligent towage pure and simple (Record, p. 7).

The sole question presented by the petition is whether the Harter Act applies to a case of negligent towage. The books are full of cases where towing vessels have been held responsible for loss of or injury to barges and their cargoes and the only way in which this case may differ from those cases is that the barge and the towing steamer were owned by the same person. We submit that the decisions are uniform to the effect that this is a distinction without a difference and that, moreover, the point is hardly one of such "peculiar gravity and general importance" as would justify the issuance of certiorari. The amount involved in the case is some $12,000.00.

The Law.

Section 3 of the Harter Act reads in part as follows:

> "Sec. 3. (Limitation of Liability for Negligent Navigation, Dangers of the Sea, Acts of God, Etc.) That if the owner of *any vessel transporting merchandise* or property to or from any port in the United States of America shall exercise due diligence to make the *said vessel* in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners,

> agent, or charterers shall become or be held responsible for damage or loss resulting *from faults or errors in navigation* or in the management of *said vessel* * * *."

The above italicizing *clearly* shows that the section is only applicable as a defense *to the vessel on which the cargo is carried*, and, as said in the case of *The Delaware*, 161 U. S. 459; 40 L. Ed. 771, its provisions "*have no possible application to the relations of one vessel to another*"—a holding frequently quoted and approved in other cases. We gladly agree with petitioner that the *facts* in the case of *The Delaware* are in no way similar to the facts in the case at bar, but the *principle* there laid down is *directly applicable* and is clearly necessitated by a reading of the Harter Act as above quoted.

The exact question presented in the case at bar is one which rarely arises, but, wherever it has arisen, the Circuit Courts of Appeal have been in complete agreement in regard thereto. Thus the decision of the Circuit Court of Appeals for the Ninth Circuit in the case at bar is squarely supported by two decisions of the Circuit Court of Appeals for the First Circuit.

> *Baltimore & Boston Barge Co. v. Eastern Coal Co.*, 195 Fed. 483 (affirming 200 Fed. 826);
>
> *The Coastwise*, 233 Fed. 1, 3-4 (affirming 230 Fed. 505).

At the risk of unduly lengthening this memorandum, we quote at some length from the case last cited because of its peculiar applicability to the facts of the case at bar:

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the

owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law. *A careful examination of the language and history of the Harter Act leads us to the conclusion that section 3 is dealing with the specific vessel in which the merchandise is being transported.* The Irrawaddy, 171 U. S. 187, 195, 196; 18 Sup. Ct. 831, 43 L. Ed. 130; Ralli v. New York & T. S. S. Co., 154 Fed. 287, 83 C. C. A. 290. A similar case was considered by this court, but not decided, in The Cygnet, 126 Fed. 742, 745; 61 C. C. A. 348.

The proofs in the case at bar, however, present a still stronger case for the libelant. *Here the contract of towage was made by the tug; the bill of lading for the cargo was made by the barge.* It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well. We must conclude, as Judge Dodge did in deciding The Murrell, in the District Court, 209 Fed. 826, 831, that it is difficult to believe that Congress intended a construction of the Harter Act leading to such a result. It is true that for some purposes, the tug may be said to take part in the transportation of the cargo of the barge; and that, where questions of limited liability have arisen, the tug and tow have been regarded as one vessel.* It

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* NOTE.—Even this is no longer the law (*Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal*, cited *infra*).

is urged by the claimant that this doctrine has been carried even further. In The Nettie Quill (D. C.), 124 Fed. 667, the District Court for the Southern District of Alabama had before it the fact that the owner of a steamer making regular trips had agreed to transport a locomotive, under a bill of lading in the usual form; he undertook to carry the locomotive on a barge, towed alongside, and belonging to the locomotive's owner. *This barge was also covered by the bill of lading.* The court held the contract to be one of affreightment, not of towage and subject to the Harter Act. No such question arises in the case at bar. Here the contract with the tug was clearly a contract of towage. *The bill of lading was made with the barge only, not with the tug.* There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure.

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where, in speaking for the court, Judge Wallace said:

'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collisions; but *it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations, as between themselves, or their several liabilities to respond for the consequences of a fault of one of them.* Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.'

Judge Wallace cited The James Gray v. John Frazer, 21 How. 184, 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110, 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is

> clear, and we must hold, that, within the meaning of the Harter Act, the tug and the barge were not one entity, and the tug Coastwise was not 'transporting merchandise or property'.
>
> The claimant is not exonerated by the Harter Act from liability for loss of the cargo."

It will be noted that the case of *The Nettie Quill,* 124 Fed. 667, also relied on by petitioner, is clearly distinguished in the above citation.

Petitioner cites the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *The Columbia,* 73 Fed. 226, and *The Seven Bells,* 241 Fed. 45, as holding or intimating that tug and tow become one vessel for the purposes of the voyage or "one instrumentality in the voyage". This might be so for some purposes, but in *neither* case was it held or even intimated that the Harter Act would be a defense to the towing vessel in a suit brought by the owner of cargo on the vessel that was being towed. Both of these decisions are clearly distinguished in the opinion in the case at bar (Record, p. 142). Moreover, this theory of "one instrumentality" is, in our opinion, clearly exploded by this court in the case of *Liverpool etc. Navigation Co. v. Brooklyn etc. Terminal,* 251 U. S. 48; 64 L. Ed. 130, holding, in *limitation* proceedings, that such is not the case. The court says:

> "The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility. (Citing cases.) These cases show that for the purposes of liability the passive instrument of the

harm *does not become one with the actively responsible vessel by being attached to it.* If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid, and so were more helpless under its control than in the ordinary case of a tow.

It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling,—that the object of the statute is 'to limit the liability of vessel owners to their interest in the *adventure*' (The Main v. Williams, 152 U. S. 122, 131; 38 L. Ed. 381, 384; 14 Sup. Ct. Rep. 486), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. *But that is the question, and it is not answered by putting it.* The respondent answers the argument with the suggestion that, if sound, it supplies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of the opinion that the statute does not warrant the distinction for which the petitioner contends * * *.

The words of the statute are: 'The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel.' The literal meaning of the sentence is reinforced by the words 'in no case'. For clearly the liability would be made to exceed the interest of the owner 'in such vessel' if you said frankly, 'In some cases we propose to count other vessels in although they are not "such vessel";' and it comes to the same thing when you profess a formal compliance with the words, but reach the result by artificially construing 'such

vessel' to include other vessels if only they are tied to it."

Petitioner seeks to distinguish this case on the ground that it involves the Limited Liability Act, the provisions of which are not similar to the Harter Act. It is submitted, however, that just as, under the former act, only the vessel doing the damage can be held liable, so, under the latter act, only the vessel *actually carrying the cargo* can claim its benefit. We think it clear that the one conclusion follows the other and we have already shown that a fair reading of the Harter Act necessarily involves this construction.

Petitioner also refers to the case of *The Northern Belle*, 9 Wall. 526; 19 L. Ed. 746. In that case the *barge* on which the cargo was carried *was unseaworthy* and the court held that the case turned entirely on that point. The passage from the case cited by petitioner (Brief, p. 14) is mere dictum and must be considered in the light of the later decision in *Liverpool etc. Co. v. Brooklyn etc. Terminal, supra.*

Petitioner frequently says that there was no towage contract made in this case. Admitting that respondent may not have itself made a towage contract, it granted petitioner the "privilege of towing" and, even apart from this, contracts can be implied as well as express and, when petitioner engaged its steamer for the tow, it made an implied contract with respondent for such towage. If it had (as it might have done) engaged the steamer of a third party to make the tow, such steamer

would clearly have made an implied contract with respondent through the petitioner and would obviously have been liable for the loss. How, then, can petitioner be relieved when it engaged its own steamer? The two cases are parallel.

We submit that the law governing the case at bar is clear and uniform and that it was correctly applied by the Circuit Court of Appeals.

Conclusion.

It is finally submitted that not only are the concurring decisions of the two lower courts right and in accordance with decisions elsewhere, but also that the question involved is *in no sense* of "peculiar gravity and general importance". On the contrary, the question involved is one which seldom arises, of no gravity and of importance only to a few river carriers operating both steamers and barges of their own. We therefore submit that the petition for certiorari should be denied.

Dated, San Francisco,
March 25, 1925.

Respectfully submitted,

S. Hasket Derby,
Carroll Single,
Proctors for Respondent.

ENTRY OF APPEARANCE.

The undersigned hereby enter their appearance in the above cause as counsel for the respondent, Milton H. Salz.

Dated, San Francisco,
March 25, 1925.

S. HASKET DERBY,
CARROLL SINGLE,
Proctors for Respondent.

In the Supreme Court
OF THE
United States

October Term, 1925.

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No. [redacted] 51

SACRAMENTO NAVIGATION COMPANY
(a corporation),
Petitioner,

vs.

MILTON H. SALZ, doing business as
E. Salz & Son,
Respondent.

BRIEF FOR RESPONDENT.

S. HASKET DERBY,
CARROLL SINGLE,
Merchants Exchange Bldg., San Francisco,
Proctors for Respondent.

Parker Printing Company, 523 Clay Street, San Francisco

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In the Supreme Court
OF THE
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October Term, 1925.

No. 330

SACRAMENTO NAVIGATION COMPANY
(a corporation),
Petitioner,

vs.

MILTON H. SALZ, doing business as
E. Salz & Son,
Respondent.

BRIEF FOR RESPONDENT.

This case is here on a writ of certiorari issued to the Circuit Court of Appeals for the Ninth Circuit which affirmed a decree of the District Court for the Northern District of California in favor of respondent and against petitioner for the sum of $11,964.83 with interest and costs.

STATEMENT OF FACTS.

As petitioner's brief does not clearly present all of the facts in the case, we prefer to make our own statement of the same.

Respondent

~~Petitioner~~ brought suit "in a cause of towage and damages, civil and maritime" (Record, p. 5), seeking to recover for the *negligent towage* of his cargo of barley (loaded on petitioner's barge "Tennessee") by petitioner's steamer "San Joaquin No. 4" (Id. 6-7). It appears that this barley was shipped on board the barge "Tennessee" at two upper river landings on the Sacramento River (Celli's and Woods Break) for transportation to Port Costa and that two shipping receipts were issued therefor containing the conditions of carriage (see Shipping Receipts not printed; also Record, pp, 111, 115; also Petitioner's Brief, p. 2). It is our contention, upheld by the two lower courts, that these shipping receipts evidenced contracts made solely *with the barge.* The shipping receipts give "the privilege of towing with one steamer, at the same time *between Sacramento and San Francisco,* down or up, two or more barges", but the steamer "San Joaquin No. 4" is not specifically mentioned and, indeed, the words "Str. Red Bluff" appear stamped on the receipts. This is mentioned for the purpose of showing that petitioner could have made this tow with *any* steamer and could have hired a steamer from *another company* to make it.

After the above receipts were issued and the barley loaded on the "Tennessee" at the river landings above mentioned, the "Tennesee" proceeded to Sacramento in some way not shown by the record. It is obvious, however, that she was *not* then in tow of the "San Joaquin No. 4" and possibly not in tow of any steamer, for it clearly appears from the testimony of petitioner's pres-

ident that the *upper* river where the barley was loaded is narrow, crooked and shallow and very difficult to navigate, the channel being at times scarcely wider than the barge itself and that men put on the "San Joaquin No. 4" are only so placed *after* being trained on the upper river (Record, pp. 111-112). At any rate it is clear from the testimony that the tow in question only began at Sacramento (Id. pp. 25-26).

At Sacramento the "Tennessee" and also three other barges were picked up by the said "San Joaquin No. 4" and the voyage from there to Port Costa was begun (Record, pp. 25-26). Thereafter the towing steamer brought the "Tennessee" into collision with the British steamer "Ravenrock" and, as a consequence, the barge sank and respondent's cargo was lost. That the negligence of the "San Joaquin No. 4" caused this collision and loss was disputed in the trial court, but was there found as a fact (Record, pp. 117-118) and, as a condition of omitting a large part of the record on appeal, was conceded by petitioner for the purposes of said appeal (Id. p. 127) and is again conceded in this court (Petitioner's Brief, p. 4).

Petitioner frequently refers to the carrying vessel in this case as being the "steamboat-plus-barge" and ridicules the contention that the barge alone is the carrier under the shipping receipts. It refers to the barge as being "helpless" and "without motive power", which it has not proved to be the case, but, assuming it to be so, the record clearly shows that the barge is an important element in the transportation. It has a pilot house on

an elevated bridge, with four rudders on the stern, carries a regular barge pilot and crew (Record, p. 96) and has its own steering and navigation to attend to (Id. p. 102). This at least is shown to be the case as to the *front* barge on the tow from Sacramento and must be assumed to be true of the other barges on the voyage from the upper river landings *to* Sacramento, where there was no privilege to tow more than one barge at a time and where, as pointed out, the navigation is so much more difficult and dangerous. These points may not be very important, but they demolish petitioner's implication that the barge is a negligible factor in the contract of carriage.

Petitioner says that "it should be particularly noted that the libel was promoted against petitioner *in personam* as owner of the barge and the negligent steamer" (Brief, p. 3). If the "San Joaquin No. 4" was liable *in rem*, her owner is of course liable *in personam* and, as a matter of fact, the suit was brought *in personam* for purposes of convenience and the accommodation of both parties and, perhaps also, to enable respondent to take advantage of any rights it might have against the *barge* (if she had proved unseaworthy). Respondent's theory all through the case, however, has been that the petitioner, *as the owner of the towing steamer,* and *not* as the owner of the barge, was responsible for the negligent towage, expressly alleged in the libel, and the suit should, of course, be considered on the same basis as if brought *in rem* against the towing steamer.

This, then, is a case of loss due to negligent towage and would be a very simple one if it were not for the

fact that both the barge and the steamer were owned or operated by the same company. Owing to this common ownership or operation*, however, petitioner contends that it is absolved from liability (a) under the Harter Act and (b) under the provisions of the shipping receipts.

Our contentions, on the contrary, are (a) that the Harter Act does not apply as between tug and tow and (b) that the provisions of the shipping receipts (1) are only applicable to the "Tennessee" and *not* to the "San Joaquin No. 4", (2) do not, by their terms, purport to cover negligent towage and (3) even if so construed, are invalid under the law of tug and tow.

ARGUMENT.

I.

THE HARTER ACT DOES NOT APPLY.

We will, for purposes of clarity, divide this subject into two headings, the first dealing with the contract between the parties and the second with the law applicable thereto, although both subjects are interwoven.

A.

The Contract between the Parties.

Petitioner frequently says in its brief that this is not a case of *towage*, but of affreightment, and, in doing so, it loses sight of *what* contract is involved and assumes

*Note: Although petitioner's defense is grounded solely on this basis of common ownership, it being conceded that the Harter Act does not apply to the ordinary case of tug and tow, it goes far afield in supporting its contentions and *most* of its arguments are applicable to *all* towage cases.

that this contract is evidenced by the shipping receipts. The last named contract *is,* of course, one of *affreightment,* but this is not true *as regards the relations existing between respondent and the "San Joaquin No. 4".* As to the latter the case is one of *towage* and the "privilege of towing" given in the shipping receipts itself shows this.

Petitioner says that it is a misnomer to state that the contracts evidenced by the shipping receipts were made *with the barge*—that they were made "with the petitioner, a transportation company, and not with the barge". This involves a fundamental misconception of the relation between ships and shippers. Literally, of course, no contract is ever made *with a ship*—a ship has no mouth to speak with or pen to write with. But when a bill of lading is made out and the name of the ship on which the goods are to be transported is inserted therein, *the contract becomes one with the named ship* and that ship is bound to its performance. And this is true whether, as in the old days, the contract is signed by the master or, as in modern times is generally the case, by the shipowner himself or his agents. And so when, as in the present case, the name of the barge "Tennessee" was inserted in ink on the shipping receipts as the vessel "on board" which the respondent's barley was shipped, that ship and no other was the one with which the contract of affreightment was made.

Petitioner implies that the "Tennessee", being a "powerless barge", is merely "a part" of the steamer moving it and not the real vessel "transporting" the cargo.

Overlooking the fact that this argument would apply to *all* cases of tug and tow (when the tows are barges) it is not sound. We have already pointed out that this barge with bridge, rudders and crew is possessed of important functions in navigating. Barges (even without rudders) are clearly "vessels" subject to the admiralty jurisdiction (*Ex parte Easton,* 95 U. S. 68; 24 L. Ed. 373, at p. 375; 1 *Corpus Juris* 1264-1265 and cases there cited). They are also subject to the Harter Act and the Limitation Act (see 6 Fed. Stats. Ann. 2 ed. 387). In the latter Act it was originally provided that it should not apply to barges used in river or inland navigation (R. S., Sec. 4289; 6 F. S. A. 367), but the Act was amended in 1886 so as to expressly include such barges (Act of June 19, 1886, ch. 421, Sec. 4; 24 St. L. 80; 6 F. S. A. 367) and there was never any such limitation in the Harter Act. Petitioner's implication that a barge alone cannot be a "vessel transporting merchandise" within the latter Act, is refuted by *Ex parte Easton,* cited supra, where this court says:

> "Goods of vast amount are *transported* by such means of conveyance."

The foregoing is merely cited to illustrate the entire reasonableness of the holding of the two lower courts that the contract evidenced by the shipping receipts was made with the barge only and *not* with the towing steamer. But those receipts are *not* the contract sued on in this case—it is the towage contract (or rather the relation arising out of the towage) that is sued on.

Petitioner also frequently says that there was no towage contract made in this case. Admitting that respond-

ent may not have itself expressly made a towage contract, it granted petitioner the "privilege of towing" and, even apart from this, the fact remains clear that contracts can be implied as well as express and when petitioner engaged its steamer for the tow, it made an implied contract with respondent for such towage, as, indeed, the Circuit Court of Appeals held in the case at bar (Record, p. 141). If petitioner had engaged the steamer of a third party to make the tow, such steamer would clearly have made an implied contract with respondent through the petitioner and would obviously have been liable for the loss (whether *ex contractu* or *ex delicto* is immaterial). How then can petitioner be relieved when it engaged its own steamer?

The foregoing (perhaps not too well put) may tend to clear up petitioner's erroneous conception that we must recover on our shipping receipts or not at all. The recovery we are asking for is not based on these shipping receipts, but is based on the relation of tug and tow existing between the towing steamer "San Joaquin No. 4" and respondent's cargo of barley. This will be made clearer as we proceed with the second branch of the argument under this heading.

B.

The Law Applicable to the Situation under the Harter Act.

Section 3 of the Harter Act provides as follows:

> "Sec. 3. (Limitation of Liability for Negligent Navigation, Dangers of the Sea, Acts of God, Etc.) That if the owner of *any vessel transporting merchandise* or property to or from any port in the United States of America shall exercise due diligence to make *the said vessel* in all respects seaworthy

> and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting *from faults or errors in navigation,* or in the management *of said vessel* * * *."

The above italicizing *clearly* shows in our opinion that the section is only applicable as a defense *to the vessel on which the cargo is carried* and as said in the case of *The Delaware,* 161 U. S. 459; 40 L. Ed. 771, its provisions *"have no possible application to the relations of one vessel to another"*—a holding frequently quoted and approved in other cases.

This is further borne out by the case of *The Irrawaddy,* 171 U. S. 187; 43 L. Ed. 130, 133 where the court says:

> "Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."

We entirely agree with petitioner that the *facts* in the cases of *The Delaware* and *The Irrawaddy* are in no way similar to the facts in the case at bar, but the principles there laid down are *directly applicable* and are necessitated by a reading of the Harter Act as above quoted. And, if those principles are applicable (especially under the rule of *strict* construction), then it is clear that the provisions of the Harter Act "have no possible application to the relations of the 'San Joaquin No. 4' to the 'Tennessee' and her cargo".

Fortunately, however, we are not compelled to rely solely on the above two cases, but are able to cite three well reasoned cases (besides the one in the case at bar), passing through both the District Court and the Circuit Court of Appeals, wherein it is squarely held that the Harter Act has no application to the relations of tug and tow, *even where the tug and tow are, as in the case at bar, owned by the same person.* This court, of course, is not bound by those decisions, but their unanimity seems to us to be highly persuasive.

In *The Murrell,* 200 Fed. 826, where the barge on which libelant's cargo was being transported was owned by the same person who owned the tug and where the question of the tug's liability to the tow was directly involved and where also it was contended that the Harter Act applied as a defense, the court said in part (at pp. 829-832):

> "(5) That the Harter Act has no application to negligent towage when tug and tow belong to distinct owners, having with each other only the relations arising under an ordinary contract for safe towage, I shall take for granted. To say that the owner of the tug, in such a case, is 'engaged in transporting merchandise or property', is to extend those words of the Harter Act so as to make them include what Congress never intended them to include. If this is not obviously true, I must regard it as beyond question since the decision in the Delaware, 161 U. S. 459, 471, 16 Sup. Ct. 516, 522 (40 L. Ed. 771). In holding that the act could not exempt the owner of one vessel from liability for damage negligently inflicted by collision upon another, the Supreme Court said:

'It is entirely clear that the whole object of the act is to modify the relations previously existing between a vessel and her cargo.' "

* * * * * * *

"The petitioner, as has appeared, was using two vessels in the transportation of the barge's cargo—one of them the barge upon which the coal was laden, and whose cargo it was in the ordinary sense; the other, the tug, which furnished the motive power and controlled the general direction, not only for the barge, but for another vessel not brought into this case. If, as the Supreme Court has said, the Harter Act has no other object than to modify the relations previously existing between a vessel and her cargo, it is necessary, in order to apply it in this case, to find some sense in which the cargo of the barge can properly be called the cargo of the tug. There is no more reason for saying that the West Virginia's cargo may be called the cargo of the tug than for saying that the cargo of the other barge might be so described. Neither barge was being towed alongside the tug. Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal. *To that contract the owner of the tug may indeed have been one of the parties, but there is nothing to show that anything to be done by this particular tug was contracted for.* If the mutual obligations between cargo and carrying vessel could ever have arisen between the tug and the cargo here in question, they could only have arisen from the fact that the tug was actually towing the barge containing the cargo and they could have had no existence before such actual towage began. No reason whatever appears for calling the coal on board the barge cargo of the tug until the barge was taken in tow. Before that time there was no reason whatever for

calling it the cargo of any other vessel than the barge. *The petitioner's contention thus requires it to be regarded as at one time the cargo of the barge only, and at a later time the cargo of the tug as well, there being also at that time another cargo with an equal claim to be regarded as the tug's cargo. It is difficult to believe that a construction of the Harter Act which involves results of this kind could have been intended by Congress.*"

The two italicized portions of the above quotation show how peculiarly applicable the case is to the case at bar. Nothing to be done by the "San Joaquin No. 4" was contracted for and in fact the only steamer mentioned in the bills of lading was the "Red Bluff" (see Shipping Receipts). The "Tennessee" moved from its loading places to Sacramento before the towing steamer picked her up. There was *other* cargo besides respondent's on the "Tennessee" and *other barges* also were towed with still other cargoes (Record, pp. 26, 111). Thus, to sustain petitioner's contention, the cargo must be "regarded as at one time the cargo of the barge only, and at a later time the cargo of the tug as well, there being at that time another cargo with an equal claim to be regarded as the tug's cargo". It is, indeed, difficult to believe that the Harter Act was intended to involve results of this kind and to make the cargo *on all four barges* the cargo of the towing steamer, which also undoubtedly carried cargo of its own.

The case last cited was affirmed on appeal in *Baltimore & Boston Barge Co. v. Eastern Coal Co.,* 195 Fed. 483, where the court said in part (at p. 485):

"Clearly on its face the Harter Act had in mind not so much a broad principle, as only the relations

which exist between a vessel and the cargo with which she is herself laden. From that point of view there is enough to justify the following expression in the opinion in behalf of the Circuit Court of Appeals in Ralli v. N. Y. & Y. S. S. Co., 154 Fed. 286, 83 C. C. A. 290, decided on April 30, 1907 by a strong court:

> 'Manifestly this section deals with a specific vessel; i. e. the vessel *on which* the merchandise is being transported.'
>
> This refers to the third section of the Harter Act, but inevitably it must be taken to concern the whole of the statute. Consequently, in any view, we are obliged to sustain the conclusions of the District Court."

Exactly the same point was involved and the same conclusion was reached in the case of *The Coastwise,* 230 Fed. 505, and, in affirming this decision on appeal, the Circuit Court of Appeals for the First Circuit said (233 Fed. 1, 3-4):

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel, or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law. *A careful examination of the language and history of the Harter Act leads us to the conclusion that section 3 is dealing with the specific vessel on which the merchandise is being transported.* The Irrawaddy, 171 U. S. 187, 195, 196, 18 Sup.

Ct. 831; 43 L. Ed. 130; Ralli v. New York & T. S. S. Co., 154 Fed. 287; 83 C. C. A. 290. A similar case was considered by this court, but not decided, in The Cygnet, 126 Fed. 742, 745; 61 C. C. A. 348.

The proofs in the case at bar, however, present a still stronger case for the libelant. *Here the contract of towage was made by the tug; the bill of lading for the cargo was made by the barge.* It is clear, then, that, up to the time when the hawser was passed from the tug to the barge, the coal was the cargo of the barge alone. If, then, we follow the claimant's contention, we are compelled to hold that the cargo was at one time the cargo of the barge alone, and at a later time the cargo of the tug as well. We must conclude, as Judge Dodge did in deciding The Murrell, in the District Court, 200 Fed. 826, 831, that it is difficult to believe that Congress intended a construction of the Harter Act leading to such a result.

* * *

* * * * * * *

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where, in speaking for the court, Judge Wallace said:

> 'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collision; but *it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves or their several liabilities to respond for the consequences of a fault of one of them.* Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.'

Judge Wallace cited The James Gray v. John Frazer, 21 How. 184; 16 L. Ed. 106; Sturgis v. Boyer, 24 How. 110; 16 L. Ed. 591; The Carrie L. Tyler, 106 Fed. 422; 45 C. C. A. 374; 54 L. R. A. 236.

> Upon the proofs in the case at bar, and upon the facts found correctly by the District Court, it is clear, and we must hold, that, within the meaning of the Harter Act, the tug and the barge were not one entity, and the tug Coastwise was not 'transporting merchandise or property'.
>
> The claimant is not exonerated by the Harter Act from liability for loss of the cargo."

This language is especially significant here, because it lays emphasis on the very fact emphasized by both of the lower courts in this case, namely, that the bill of lading for the cargo was made *with the barge* and *not* with the tug.

We feel no need to comment on the attempts of petitioner to distinguish these cases or to conclude that they are wrongly decided. When petitioner says, however, that

> "it makes no contention that respondent's cargo was at one time, or ever, the cargo of the barge alone, and at a later time the cargo of the tug as well" (Brief, p. 31),

it overlooks the patent fact that, at the time the "San Joaquin No. 4" picked up the "Tennessee" at Sacramento, the upper river passage (and the most dangerous part of the voyage) had already been completed and that it neglected to show in the record *how* it was completed. It says that the cargo was "at all times" the cargo of "steamer-plus-barge", but neglects to manifest the "steamer" for the first leg of the voyage. It also wholly neglects to disclose the part played by the "Tennessee" in the voyage from Sacramento to Port Costa.

In line with the above two cases of *The Murrell* and *The Coastwise* from the First Circuit and the case at bar

from the Ninth Circuit is the case of *Bradley v. Lehigh Valley R. R. Co.,* 145 Fed. 569, 573; affirmed in 153 Fed. 350, 352, from the Second Circuit. In that case wheat was being transported under a through contract of affreightment and, at the time of the disaster, was on board a canal boat in tow of a tug, both being owned by the defendant. It was held by the District Court and assumed, if not decided, by the Circuit Court of Appeals that the defendant railroad company could not take advantage of the Harter Act as the owners of the tug, though they could do so as the owners of the canal boat (the common carrier), *if* (as the Circuit Court of Appeals held was not the case), the latter had been proved seaworthy and the negligent navigation had been that of the captain of the canal boat. In that case, as in the case at bar, there was no express towage contract, but, as before stated, the wheat was being moved under a through contract of affreightment with the defendant railroad company which owned both vessels. The District Court said (145 Fed. at p. 573):

> "The loss here apparently occurred through the negligence of the tug, notwithstanding the seaworthiness of the Dean, and there does not seem to be anything in the Harter Act which tends to exonerate her owner from liability therefor. The question as to the application of that statute to a case where both the tug and tow were owned or controlled by one person has not apparently been decided. It was raised in The Cygnet, 126 Fed. 742; 61 C. C. A. 348, before the circuit court of appeals for the first circuit but it was there found unnecessary to decide the question. In The Nettie Quill (D. C.) 124 Fed. 667, a locomotive carried on a barge towed by that steamer was dumped overboard. There a bill of

lading was issued by the steamboat and the court, Toulmin, J., decided that the contract was one of affreightment, rather than of towage, and the Harter Act applied, but there can be no question of the kind here as the relation of the tug was one of towage.

Here there was no such connection between the tug and the wheat, as would bring the Act into operation. The relief afforded by the Act should not be unduly extended and, in the absence of authority making it applicable to a case of this kind, I think that the owner of the tug should be held, unless some defense exists by reason of the insurance of the wheat."

The Circuit Court of Appeals said (153 Fed. at p. 352):

"If the tug was negligent, the railroad company as her owner was, *of course,* responsible. If the tug was not negligent, the company was responsible for the breach of its duty as a common carrier to carry the wheat safely on the Dean (the canal boat), because the disaster was caused in part at least by the conduct of the captain of the Dean."

If the case in question was correctly decided, it is an exact counterpart of the case at bar, the only difference being that the "Dean" was not proved to be seaworthy and the "Tennessee" was, thus exonerating the latter. The *towage* question is exactly the same in both cases and the "steamer-plus-barge" argument did not appear to receive the court's approval.

We feel that we could safely rest on this branch of the case at this point, but it seems wise to review briefly some of the decisions relied on by petitioner.

Petitioner cites the decisions of the Circuit Court of Appeals for the Ninth Circuit in *The Columbia,* 73 Fed.

226; *The Seven Bells,* 241 Fed. 43 and *The Thielbek,* 241 Fed. 209, as holding or intimating that tug and tow become one vessel for the purposes of the voyage or "one instrumentality in the voyage". This might be so for some purposes, but in none of these cases was it held or even intimated that the Harter Act would be a defense to the towing vessel in a suit brought by the owner of the cargo on the vessel that was being towed. They are therefore not in point, as expressly held by the *same* court in the case at bar. We will, however, briefly distinguish these cases from our own standpoint.

The Columbia, 73 Fed. 226, was a proceeding for limitation of liability, in which it was held that the tug and tow were one vessel for the purpose of that proceeding and must both be surrendered. There is no holding or intimation that the tug was not responsible for loss of cargo on the tow.

In *The Seven Bells,* 241 Fed. 43, the owner of cargo on a barge being towed *recovered* from the owners of both the launch and the tow (the owners of the barge being held to be also the owners of the launch *pro hac vice*—see p. 45) on the ground that the launch was insufficiently equipped to handle the barge. The passage relied on by petitioner (Brief, p. 18) is pure dictum and there is no holding that the Harter Act applies to the tug. Moreover the court does not hold, as stated by petitioner, that the contract was *not* one of towage, but that it was not "a *mere* contract of towage". That the case is plainly distinguishable is indicated by the fact that the judge who decided the case in the lower court was the same

judge who decided the case at bar and that the same Circuit Court of Appeals decided both cases.

In *The Thielbek,* 241 Fed. 210, it was held that the tug and tow were guilty of no negligence as regards a third vessel, the relations of the tug and tow not being involved. It is intimated that the tug and tow are to be considered as one vessel *for the purpose of navigation,* i. e. regarding liability to a third party.

The most that these cases can be said to establish is that for certain purposes (not involving the Harter Act or the relations of the vessels *to each other*) the tug and tow are to be considered as a unit. While this conclusion in no way affects the case at bar, it somewhat clarifies the situation to point out that said conclusion is opposed to the following decisions in other circuits on this point as to the unity of the two vessels.

Van Eyken v. Erie R. Co., 117 Fed. 712, 717;
The W. G. Mason, 142 Fed. 913;
The Transfer No. 21, 248 Fed. 459;
The Erie Lighter 108, 250 Fed. 490, 497-498.

The conflict between these two sets of cases was, in our opinion, finally set at rest by the decision of the Supreme Court of the United States in *Liverpool etc. Navigation Company v. Brooklyn etc. Terminal,* 251 U. S. 48; 64 L. Ed. 130. In that case, the tug "Intrepid", having lashed *alongside her* a disabled tug and a tow of car floats came into collision with the steamer "Vauban". In holding (contrary to the decision in the Ninth Circuit in *The Columbia,* supra) that, to obtain limitation of liability, it was only necessary to surrender the "In-

trepid" (and not the attached car floats also) the court said, in part:

> "The car float was the vessel that came into contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility (Citing cases). These cases show that for the purposes of liability the passive instrument of the harm *does not become one with the actively responsible vessel by being attached to it.* If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the Intrepid, and so were more helplessly under its control than in the ordinary case of a tow.
>
> It is said, however, that when you come to limiting liability, the foregoing authorities are not controlling—that the object of the statute is 'to limit the liability of vessel owners to their interest in the *adventure*' (The Main v. Williams, 152 U. S. 122, 131, 38 L. Ed. 381, 384, 14 Sup. Ct. Rep. 486), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. *But that is the question, and it is not answered by putting it.* The respondent answers the argument with the suggestion that, if sound, it supplies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the petitioner contends. * * *
>
> The words of the statute are: 'The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel'. The literal meaning of

> the sentence is reinforced by the words 'in no case'. For clearly the liability would be made to exceed the interest of the owner 'in such vessel' if you said frankly, 'In some cases we propose to count other vessels in although they are not "such vessel";' and it comes to the same thing when you profess a formal compliance with the words, but reach the result by artificially construing 'such vessel' to include other vessels if only they are tied to it."

Petitioner seeks to distinguish this case (and to reconcile *The Columbia,* supra, with it) on the ground that it involves an "injury by collision" under the Limited Liability Act and that "in order to arrive at the interest of the owner in the offending vessel, it was necessary to differentiate between the two vessels and to determine *which one* of the two vessels committed the *injury*" (Brief, p. 16). Counsel overlooks the broad scope of the Limitation Act, which not only covers "injury by collision", but "any loss or damage" and "any act, matter, or thing, loss, damage or forfeiture, done, occasioned or incurred". It is submitted that if, in the case at bar, limitation had been sought by petitioner, it would (as in the *Liverpool* case) have only been compelled to surrender the towing steamer and *not* the barge, because the former alone was responsible for the loss. And just as, under the Limitation Act, only the vessel doing the damage can be held liable, so, under the Harter Act, only the vessel *actually carrying the cargo* can claim its benefit. We think it clear that the one conclusion follows the other and we have already shown that a fair reading of the Harter Act involves this construction and certainly a *strict* construction of the same (which this court has held to be necessary) involves it.

It is therefore submitted that this decision sets at rest the idea that, in the case at bar, the steamer "San Joaquin No. 4" and the barge "Tennessee" were a single instrumentality for the purpose of the voyage. It also makes it clear that respondent, as the innocent owner of cargo shipped on the "Tennessee", could have sued the "San Joaquin No. 4" as a *separate* vessel *in rem* and he equally can, as he has done, sue her owners *in personam,* even though they also owned the vessel that was being towed.

Petitioner also cites the case of *The Nettie Quill,* 124 Fed. 667. The court there held that, even if the contract were one of towage, there was no breach of the towage obligation and therefore no liability. As regards the other point as to the contract being one of affreightment, the court lays stress on the fact that said contract was made *"with the steamboat"* and bases its decision on that ground, as, indeed, it had to do, for the reason that *the barge was not owned by the respondent, but by the libelant and was also covered by the bill of lading.* The case is clearly not in point and is clearly distinguished in the case of *The Coastwise,* 233 Fed. 1, 3-4, where the court says:

> "In the Nettie Quill, (D. C.) 124 Fed. 677, the District Court, for the Southern District of Alabama had before it the fact that the owner of a steamer making regular trips had agreed to transport a locomotive, under a bill of lading in the usual form; he undertook to carry the locomotive on a barge, towed alongside, and belonging to the locomotive's owner. *This barge was also covered by the bill of lading.* The court held the contract to be one of affreightment, not of towage, and subject to the Harter Act. No such question arises in the case at bar. Here

the contract with the tug was clearly a contract of towage. *The bill of lading was made with the barge only, not with the tug.* There is nothing to indicate an attempt to combine the tug and barge into a single maritime adventure.

The general rule is stated by the Circuit Court of Appeals in the Second Circuit in The W. G. Mason, 142 Fed. 913, 918; 74 C. C. A. 83, 88, where in speaking for the court, Judge Wallace said:

> 'A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault.' "

So, in the case at bar, *the bill of lading was made with the barge only, not with the steamer.* It is also to be noted that *The W. G. Mason,* 142 Fed. 913, above referred to, is one of the cases approved by the Supreme Court of the United States in the recent decision heretofore cited (see 64 L. Ed. at p. 132).

Petitioner also refers (as apparently its principal authority) to the case of *The Northern Belle,* 9 Wall. 526; 19 L. Ed. 746 (Brief, pp. 9-11). In that case the barge on which the carge was carried *was unseaworthy* and the court appeared to view the case as turning entirely on that point. As regards the concurring liability of the tug also, this can be better understood when one considers the decision of the lower court (reported under the name

of *The Keokuk,* Fed. Case No. 7,721), where it clearly appears that the tug was held in fault for proceeding at a speed of twelve miles an hour "in the night and in the shade of the surrounding timber, trees and evergreens" and "more intent upon speed than safety". The remark of this court that the barges "are generally considered as attached to and making part of the particular boat in connection with which they are used" is a mere *dictum* and is to be considered in the light of the later decision in the *Liverpool* case. The Harter Act had not been passed when the case was decided and was not in issue and, we may add, no proof whatever was adduced in the case at bar that the "Tennessee" was generally or at all considered a part of her towing steamer. It was for petitioner to offer such proof and not for respondent to negative it, but petitioner has left the court in the dark as to the functions of the "Tennessee" during the whole voyage (both on the upper and lower rivers) and of course respondent has no knowledge of these functions.

Petitioner refers frequently to the fact that the barge had no motive power and necessarily *had* to be towed, but this is an immaterial factor in the case. The same argument would be true as to *all* barges, but the books are full of cases where towing vessels have been held responsible for loss of or injury to barges or dredges. In this connection, petitioner in the Circuit Court of Appeals put the hypothetical case of a barge propelled by oars or sails or one of its own rowboats. It there said that there was no doubt that the Harter Act would apply in such a case and therefore asked what difference it made that *another boat* took the barge in tow. "But", says

Mr. Justice Holmes in the *Liverpool* case, supra, *"that is the question and it is not answered by putting it"*. The answer, of course, is that the Harter Act, under its own terms, *only applies to the vessel on which the cargo is being carried.*

We have then *this* situation. It is clearly laid down as a general principle of law, supported by the cases, that the Harter Act does not apply as between tug and tow, even when they are owned by the same person.

38 *Cyc.*, 591 (and cases there cited);
The Delaware, 161 U. S. 459; 40 L. Ed. 771;
The Murrell, 195 Fed. 483; 200 Fed. 826;
The Coastwise, 230 Fed. 505; 233 Fed. 1;
Bradley v. Lehigh Valley R. R. Co., 145 Fed. 569; 153 Fed. 350;
The case at bar.

The last four cases cited are *directly in point*, and have already been sufficiently discussed in both of the briefs.

On the other hand *no cases in point* are cited by petitioner and the few dicta on which it relies not only have no application, but are apparently opposed to the latest ruling on the subject by the Supreme Court of the United States (*Liverpool* case, supra).

It is therefore submitted that the Harter Act clearly does not apply and we are brought to the second main heading of petitioner's argument.

II.

PETITIONER IS NOT EXEMPTED FROM LIABILITY BY THE TERMS OF THE SHIPPING RECEIPTS.

An examination of the petition for certiorari in this case will show that the sole question on which said petition was sought and granted was the applicability of the Harter Act and that no relief is asked for because of the terms of the shipping receipts. Nevertheless, as the whole case is before this court on the writ, we shall briefly discuss this subject.

The shipping receipts were issued for the barge "Tennessee" and provided, *inter alia:*

> "dangers of fire and navigation, or any other peril, accident or danger of the seas, rivers or steam navigation, or steam machinery of whatever kind or nature excepted".

There are three conclusive reasons why this clause cannot apply in this case, namely:

(a) The clause is only applicable to the barge and not to the towing steamer.

(b) The clause does not excuse negligent towage.

(c) Even if the clause did purport to cover negligent towage, it would be invalid.

(a) The Exceptive Clause is only Applicable to the Barge and not to the Towing Steamer.

This point has been incidentally discussed under the last heading and need not be elaborated.

The shipping receipts were issued for the carriage of the respondent's barley *on the barge* and apply to the

barge only and to the petitioner as the owner of the barge. They do not apply to the towing steamer or to the petitioner as the owner of that steamer. In fact no towing steamer is named in the shipping receipts (unless it be the steamer "Red Bluff", which was not used) and the towage could have been made by *any* steamer, whether belonging to the petitioner or not, and, if the steamer did not belong to petitioner, there could be no question as to liability. This inevitable conclusion makes sharply applicable the following language of the District Court in the case of *The Murrell,* 200 Fed. 826, 831-832:

> "There is no more reason for saying that the West Virginia's cargo may be called the cargo of the tug than for saying that the cargo of the other barge might be so described. Neither barge was being towed alongside the tug. Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, *and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for transportation made with the owner of the coal.* To that contract the owner of the tug may indeed have been one of the parties, but there is nothing to show that anything to be done by this particular tug was contracted for. If the mutual obligations between cargo and carrying vessel could ever have arisen between the tug and the carge here in question, they could only have arisen from the fact that the tug was actually towing the barge containing the cargo, and they could have had no existence before such actual towage began. No reason whatever appears for calling the coal on board the barge cargo of the tug until the barge was taken in tow. Before that time there was no reason whatever for calling it the cargo of any other vessel than the barge. The petitioner's contention thus requires it to be regarded as at one time the cargo of the barge

> only and at a later time the cargo of the tug as well, there being also at that time another cargo with an equal claim to be regarded as the tug's cargo. *It is difficult to believe that a construction of the Harter Act which involves results of this kind could have been intended by Congress.*"

Also in *The Coastwise,* 233 Fed. 1, 3, the Circuit Court of Appeals for the First Circuit says:

> "It will be seen that, in The Murrell, this court had before it the case of an agreement by the owner of a tug to tow another owner's vessel; and this court held that there is nothing in such agreement to make the latter vessel, or her cargo, the cargo of the tug. In view of the reasoning of the Supreme Court in The Delaware, it seems clear also *that there is nothing in the agreement by the owner of a tug to tow another vessel which can be regarded as making the latter vessel, or her cargo, the cargo of the tug, even when such other vessel belongs to the same owner as the tug. And, in our opinion, this is the law.*"

In the case at bar the District Court says (Record, p. 4):

> "3. The grain that was lost belonging to Milton H. Salz was carried by the barge 'Tennessee' under a bill of lading issued *for it only and not for the towing steamer,* and though the towing steamer and the barge belonged to the same owner, the Harter Act does not apply."

The Circuit Court of Appeals (Record, p. 141) says:

> "The bill of lading was made with the barge and did not include the tug."

We submit that these citations are conclusive and that the present argument of petitioner is merely a repetition of its previous argument. If the Harter Act does not

apply to the towing steamer, then it is equally clear that the shipping receipts (which name no towing steamer) do not apply. The one proposition clearly follows the other.

The exceptions in the bill of lading would, if applicable, relieve *the barge* from the perils mentioned therein and we assume also that *the barge* could take advantage of the Harter Act. This suit, however, is brought against petitioner *as the owner of the towing steamer* and is based on *negligent towage* and not on the contract of affreightment made with the barge. And the towing steamer cannot take advantage of a shipping receipt to which it was not a party.

(b) The Exceptive Clause does not Excuse Negligent Towage.

The exceptive clause covers "*dangers* of fire and navigation, or any other peril, *accident* or *danger* of the seas". Such clauses, standing alone, obviously do not cover losses due to *negligence,* whether by collision or otherwise.

See 36 *Cyc.* (*Shipping*), 294-298 and cases there cited.

We also refer to the well settled rule that exceptions covering negligence must be made in the clearest kind of terms to be effective and there is not one word relieving petitioner from negligence in the case at bar, much less from negligent towage by a vessel not mentioned in the shipping receipts.

In *Liverpool & Great Western Steam Co. v. Phoenix Insurance Co.,* 129 U. S. 397; 32 L. Ed. 788, 791, the Supreme Court says:

"In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include 'barratry of master or mariners', and all perils of the seas, rivers or navigation, described more particularly in one of the bills of lading as 'collision, stranding or other peril of the seas, rivers, or navigation, *of whatever nature or kind soever and howsoever such collision, stranding or other peril may be caused'*, and in the other three bills of lading described more generally as any 'accidents of the seas, rivers and steam navigation, of whatever nature or kind soever': and each bill of lading adds, in the following words in the one, and in equivalent words in the others, *'whether arising from the negligence, default or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever'.*

If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Mut. Ins. Co. v. Sherwood,* 55 U. S. 14 How. 351, 364, 365 (14:452); *Orient Ins. Co. v. Adams,* 123 U. S. 67, 73 (31:63, 66); *Copeland v. New Eng. M. Ins. Co.,* 2 Met. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils, does not excuse him from that obligation or

> exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed. *N. J. Steam Nav. Co. v. Merchants Bank,* 47 U. S. 6 How. 344 (12:465); *U. S. Exp. Co. v. Kountze,* 75 U. S. 8 Wall. 342 (19:457); *Western Transp. Co. v. Downer,* 78 U. S. 11 Wall. 129 (20:160); *Grill v. General Iron Screw Collier Co.,* L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *The Xantho,* L. R. 12 App. Cas. 503, 510, 515."

The cases last cited in the above case are directly in point and we ask the court to examine them. They hold that, entirely apart from the question as to whether a carrier *can* contract against negligence, general clauses such as those used in the case at bar (where negligence is not even mentioned) do not cover losses caused by negligence. Much less, may we add, can they be construed to cover the negligence of another vessel.

Petitioner expressly admits the validity of the above argument in cases of *common carriers,* but denies it in cases of *towage,* because, it says, in the latter case the clause has "nothing to operate upon except the negligence of those who do the towing" (Brief, p. 40). It forgets in this connection that, in the case at bar, the barge (with which the contract was made) had important functions to perform (especially on the upper river), and that the clause had ample scope for its operation *in connection with the barge alone* (the common carrier) without applying it to the towing steamer which is not mentioned therein. The argument in question therefore falls to the ground.

It seems to us that, after all is said and done, the discussion of this subject merely brings us back to where we started—namely, the effect of the Harter Act. If the Harter Act applies to a towing steamer under the circumstances of this case, petitioner is relieved from liability. If it does *not* apply, the general words used in the shipping receipts are clearly not sufficient to excuse negligence.

(c) Even if the Exceptive Clause Did Purport to Cover Negligent Towage it would be Invalid.

As stated by petitioner the above heading raises an important question on which the decisions are conflicting and which is of vast interest to all connected with shipping. We consider that it is in no way involved in this case *and it was not made one of the grounds of the petition for certiorari.*

This latter is very significant, for, if petitioner had considered the point as being really involved in the case, it would surely have taken advantage of the conflicting decisions in the Second and Ninth Circuits to obtain the writ (it having been unable to find any such conflict as to the applicability of the Harter Act). Nevertheless, so long as this point is *now* raised by petitioner and the whole case is before this Court, we feel that it is incumbent on us to briefly consider it, but we shall only present the broad outlines of the question and shall not attempt to deal with it in detail.

As long ago as 1870 the Supreme Court of the United States said in the case of *The Syracuse,* 12 Wall. 167; 20 L. Ed. 382, at p. 384:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences."

This rule has (up to a very recent time) been consistently followed everywhere and is still followed in the Ninth Circuit, though repudiated in the Second, and it is held in the following cases that a towing steamer cannot relieve itself from liability for negligence.

Deems v. Albany & Canal Line, Fed. Case No. 3736 (Circuit Ct. S. D. N. Y.);

The M. J. Cummings, 18 Fed. 178 (D. C. N. D. N. Y.);

The Rescue, 24 Fed. 190 (D. C. W. D. Pa.);

The American Eagle, 54 Fed. 1010 (D. C. N. D. Ohio);

The Jonty Jenks, 54 Fed. 1021 (D. C. N. D. N. Y.);

Re Moran, 120 Fed. 556 (D. C. E. D. N. Y.);

The Somers N. Smith, 120 Fed. 569 (D. C. Me.);

Alaska Commercial Co. v. Williams, 128 Fed. 362 (C. C. A. 9th Circuit);

Mylroie v. British Columbia etc. Co., 268 Fed. 441 (C. C. A. 9th Circuit);

The Sea Lion, 1926 Am. Mar. Cases 265 (D. C. Cal.).

The rule was not adhered to *in New York* in the case of *The Oceanica,* 170 Fed. 893, which has been followed by other cases in the Second Circuit and, by *dictum* only, in *The Pacific Maru,* 8 Fed. (2nd.) 166, by the District Court for the Southern District of Georgia. In *The Oceanica* the court recognized that its ruling was a departure from previous decisions, saying (at p. 900):

> "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court."

Judge Coxe dissented from the decision, saying in part:

> "The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers, apply, though not, perhaps, to the same extent in the case of a towing contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it. I can see no reason for abrogating the rule and every reason why it should be continued."

We entirely agree that the wisdom of the rule (whether it is good law or not) "cannot be doubted". There is no monopoly better known in many ports than the monopoly of tow boat companies and any talk of freedom of contract with such a company is idle.

Petitioner makes much of the denial of *certiorari* by this court in *The Oceanica.* We do not, however, take this denial as being at all conclusive of the merits of the question and good reasons are given for it by Judge Ross in the *Mylroie* case, supra (268 Fed. at pp. 452-453; see also *The Sea Lion,* 1926 Am. Mar. Cases, Feb. issue, at p. 267). *Certiorari* was granted in the case last named, but the Supreme Court expressly refused to decide the question and left it open.

In *The Oceanica,* supra, it is to be noted that the majority opinion relies (in part at least) upon the fact that, under New York law, even a common carrier can relieve itself from liability for negligence and this has been considered a ground for distinguishing the cases in the Second Circuit (*Mylroie* case, supra).

The cases *The Maine,* 161 Fed. 401; 170 Fed. 916 and *The G. R. Crowe,* 287 Fed. 426; 294 Fed. 506, also cited by petitioner, involve a different subject matter and, as said by the Circuit Court of Appeals in the case at bar:

> "we do not see that either decision casts material light upon the question involved in the present case" (Record, p. 146).

Moreover, both cases arose *in New York,* where, as above pointed out, even common carriers may stipulate against their own negligence and naturally the rule of *The Oceanica* was followed. If *general* law and not the local New York law were applicable, however, we venture to suggest that in none of these cases did the court seem to consider the rule that a bailee for hire cannot stipulate against his own negligence. This latter rule (though not undisputed) is supported by the weight of authority in

the United States (6 *Corpus Juris,* 1112 and cases there cited in note 56; *Sporsem v. First Natl. Bank,* 233 Pacific 641, at p. 643, decided Feb. 26, 1925). And there is authority for likening a tug to a bailee for hire (*The Seven Sons,* 29 Fed. 543).

The foregoing are the main outlines of the question now under discussion. If it were really involved in the case at bar, its importance would render the method of treatment inadequate. We regard it as clearly established, however, that (a) the shipping receipts in this case were made with the barge and do not enure to the benefit of the towing steamer and (b) they clearly do *not* cover negligent towage. Hence the discussion of the present subject is largely academic, but (the point being relied on by petitioner) we have felt that we would not be justified in wholly overlooking it.

III.

CONCLUSION.

It is now respectfully submitted on the whole case that neither the Harter Act nor the Shipping Receipts have any bearing on this case; that the usual law of tug and tow applies and that the decrees of the District Court and the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, April 1, 1926.

Respectfully submitted,

S. Hasket Derby,
Carroll Single,
Proctors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1926.

Sacramento Navigation Company, Petitioner, *vs.* Milton H. Salz, doing business as E. Salz & Son.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 21, 1927.]

Mr. Justice Sutherland delivered the opinion of the Court.

This appeal involves the construction and application of § 3 of the Harter Act, c. 105, 27 Stat. 445, which, so far as pertinent here, provides: "That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . ."

Petitioner is a common carrier on the Sacramento River in California and owns and operates the barge "Tennessee," which is not equipped with motive power, and the steamer "San Joaquin No. 4." On September 23, 1921, petitioner received from respondent for transportation a quantity of barley in sacks. The bill of lading acknowledges shipment of the barley "on board of the Sacramento Transportation [Navigation] Co.'s. Barge 'Tennessee' . . . ; with the privilege of reshipping in whole or in part, on steamboats or barges; also with the privilege of towing with one steamer, at the same time, . . . two or more barges, either loaded or empty." While being towed by the steamer in the course of transportation, the barge came into collision with a British ship at anchor and was swamped. The barley was a total loss. The sole cause of the collision was the negligence of the steamer. That both barge and steamer were "in all respects seaworthy and properly

manned, equipped, and supplied," is not in dispute. Upon these facts, respondent filed its libel *in personam* against petitioner.

In the view we take of the case the sole question to be determined is whether the barge alone or the combination of tug and barge was the "vessel transporting" the barley, within the meaning of the Harter Act. This question is a nice one, and the answer to it is by no means obvious. The court below thought the contract was between the respondent and the barge, and did not include the tug; that since the barge had no power of her own, there was an implied contract that a tug would be furnished to carry her to her destination; and that the Harter Act should receive a strict construction and, so construed, it applied only to the relation of a vessel to the cargo with which she was herself laden—that is to say, in this case, the barge alone. The decree of the district court for respondent, accordingly, was affirmed. 3 F. (2d) 759.

The libel recites that it is "in a cause of towage," and in argument this is strenuously insisted upon. Towage service is the employment of one vessel to expedite the voyage of another. Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods, and plainly that contract was a contract of affreightment. See *Bramble* v. *Culmer*, 78 Fed. 497, 501; *The Nettie Quill*, 124 Fed. 667, 670. Respondent's contention, however, seems to be that the shipping contract as evidenced by the bill of lading was with or for the barge alone; but that when petitioner took the barge in tow an implied contract of towage with respondent at once arose. This view of the matter, we think, is fallacious.

The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, does not require us to disregard the actualities of the situation, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. The bill of lading declares that the cargo was shipped *on board* the barge. But it was to be transported; and this the barge alone was incapable of doing, since she had no power of self-movement. It results, necessarily, that it was within the contemplation of the contract that the transportation would be accomplished by combining the barge with a vessel having such power. Respondent says there was an implied contract to this effect;—that is, as we understand, a distinct contract implied

in fact. But a contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made, 3 Williston on Contracts, § 1293; *Brodie* v. *Cardiff Corporation,* [1919] A. C. 337, 358; and there is no justification here for going beyond the contract actually made to invoke the conception of an independent implied contract.

Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.

It is said that the Harter Act is to be strictly construed. *The Main* v. *Williams,* 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. *United States* v. *Hartwell,* 6 Wall. 385, 396; *United States* v. *Corbett,* 215 U. S. 233, 242. In the light of the decisions presently to be noted, the words, a "vessel transporting merchandise," etc., are entirely appropriate to describe the combination now in question, and we see no reason to think that Congress intended that they should not be so applied. This court and other federal courts repeatedly have held that such a combination constitutes, in law, one vessel. See *The Northern Belle,* 9 Wall. 526, 528-529; *The "Civilta" and the "Restless,"* 103 U. S. 699, 701; *The Nettie Quill, supra; The Columbia,* 73 Fed. 226; *The Seven Bells,* 241 Fed. 43, 45; *The Fred. W. Chase,* 31 Fed. 91, 95; *The Bordentown,* 40 Fed. 682, 687; *State* v. *Turner,* 34 Or. 173, 175-176.

In *The Northern Belle, supra,* this court, speaking of a combination of barge and steamboat, said that "the barge is considered as

belonging to the boat to which she is attached for the purposes of that voyage." In *The "Civilta" and the "Restless," supra,* a tug and a ship which she was towing by means of a hawser were held to be in contemplation of law "one vessel, and that a vessel under steam."

In *The Columbia, supra,* it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. . . . When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that, without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes § 4283 *et seq.*, providing for a limitation of liability of "the owner of any vessel," etc.

The court below rejected this decision as not applicable to a case arising under the Harter Act; but it is hard to see why the case is not pertinent and, if sound, controlling. What we are called upon to ascertain is the meaning of the term "any vessel," and the point decided in that case is that it includes a combination identical in all respects with that here dealt with. True, the court there, in construing the phrase, "the owner of any vessel," was considering one statute while here we are considering another and different statute; but there is no such difference between the statutes in respect of the connection in which the phrase is used or in respect of the subject-matter to which it relates as to suggest that Congress intended that it should bear different meanings.

Respondent contends that his view to the contrary is sustained by *The Murrell*, 195 Fed. 483, affirming 200 Fed. 826, and *The Coastwise*, 233 Fed. 1, affirming 230 Fed. 505. Some things are said in those cases which, if we should not consider the differences between them and the present case, might justify this contention. The most important of these differences is that in both cases it

was held that contracts of towage and not of affreightment were involved. We do not stop to inquire whether this conclusion as to the nature of the contracts was justified by the facts. It is enough that it was so held and this holding was the basis of the decisions. Here, upon all the facts, as we have just said, the contract upon which respondent must rest is one of affreightment, the obligation of which is to carry a cargo not to tow a vessel.

Liverpool, &c. Nav. Co. v. *Brooklyn Term'l*, 251 U. S. 48, also relied upon by respondent, is not to the contrary. There the libel was for a collision with petitioner's steamship, the moving cause of which was respondent's steam tug, proceeding up the East River, with a loaded car float lashed to one side and a disabled tug to the other, all belonging to respondent. The car float came into contact with the steamship; but the court said it was a passive instrument in the hands of the tug and did not affect the question of responsibility. The controversy arose upon a claim to limit liability, petitioner contending that the entire flotilla should have been surrendered. This court held that it was necessary to surrender only the active tug, saying "that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it." But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision. The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simple inquiry was, What constituted the "offending vessel"? Here we must ask, What constituted the vessel by which the contract of transportation was to be effected? a very different question. If the British ship which here was struck by the barge were suing to recover damages and a limitation of liability were sought by the owner of the tug and barge, the *Liverpool* case would be in point. But the present libel is for a loss of cargo and falls within the principle of *The Columbia*, *supra*, where, upon facts substantially identical with those here, a surrender was required of the combined means by which the company undertook the transportation of the cargo.

Decree reversed.